Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, formerly known as BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

VS.

KENNETH E. BYRD,

Respondent.

Petition for Writ of Certiorari to
The Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff in an action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1996) has the burden to produce evidence of the present value of claimed future pecuniary damages.

2. Whether a plaintiff is entitled to recover claimed future pecuniary damages in an action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1996) when the plaintiff has presented no evidence at trial relating to the present value of the plaintiff's future pecuniary damages and when the voir dire of the jury reveals that no juror knows how to determine the present value of the plaintiff's future pecuniary damages?

LIST OF PARTIES AND RULE 29.6 LIST

The parties to the proceeding below were the Petitioner, Burlington Northern Railroad Company, and Respondent, Kenneth E. Byrd. As of the date of the filing of this Petition for Writ of Certiorari, Petitioner Burlington Northern Railroad Company is now known as The Burlington Northern and Santa Fe Railway Company as a result of a merger with The Atchison, Topeka and Santa Fe Railway Company. The Burlington Northern & Santa Fe Railway Company is a wholly owned subsidiary of The Burlington Northern Santa Fe Corporation, a publicly held corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ALL PARTIES AND RULE 29.6 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
CITATIONS OF OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ISSUING THE WRIT OF CERTIORARI	8
INTRODUCTION	8
I. This Court Should Issue A Writ Of Certiorari To Determine Whether Respondent Had The Burden To Produce Evidence Relating To The Present Value Of His Future Pecuniary Damages Because There Is A Clear Split In The Federal Circuit Courts And Among The State Supreme Courts On This Issue	9
A. There Is A Clear Conflict Between The Decisions Of The Federal Circuit Courts	9
B. There Is A Clear Conflict Between The Decisions Of The State Supreme Courts	11

C. This Court Should Issue A Writ Of Certiorari To Resolve This Conflict Between The Federal Circuit Courts And Among The State Supreme Courts Because This Is An Issue Of Substantive Law Which Needs A Decisive Answer From This Court 13

D. This Court Should Approve The Third Circuit's Approach Because The Third Circuit's Approach Better Comports With Standard Tenets Of Our Judicial System And With This Court's Previous Decisions 14

II. This Court Should Issue A Writ Of Certiorari Becau;se The Missouri Court Of Appeals' Decision In This Case Circumvents This Court's Long Established Rule That Future Pecuniary Damages In A FELA Case Should Be Reduced To Their Present Value In That Respondent Was Allowed To Recover His Future Pecuniary Damages When It Was Clear From The Voir Dire Of The Jury Panel That The Jury Would Be Unable To Reduce Respondent's Future Pecuniary Damages To Present Value 19

A. This Court Has Consistently Re-affirmed That A FELA Plaintiff Is Only Entitled To Recover The Present Value Of His Future Pecuniary Damages 19

B. The Missouri Court of Appeals' Decision Circumvents This Court's Established Jurisprudence That Future Pecuniary Damages In A FELA Action Must Be Reduced To Present Value 20

III. This Court Should Issue A Writ Of Certiorari Because This Case Also Involves Questions Relating To The Proper Measure Of Damages In A FELA Action And To the Propriety Of Jury Instructions Relating To The Proper Measure Of Damages In A FELA Action 21

CONCLUSION 25

APPENDIX A-1

TABLE OF AUTHORITIES

Page(s)

Cases:

Alma v. Manufacturers Hanover Trust, 684 F.2d 622 (9th Cir. 1982) 10

Aldridge v. Baltimore and Ohio R.R. Co., 789 F.2d 1061 (4th Cir. 1986), aff'd, 814 F.2d 157 (4th Cir. 1987)(en banc), *vacated, remanded Chesapeake and Ohio Ry. Co. v. Aldridge*, 486 U.S. 1049 (1988), *rev'd Aldridge v. Baltimore and Ohio R.R. Co.*, 866 F.2d 111 (4th Cir. 1989) 11,15,16,17,20

American Dredging Co. v. Miller, 510 U.S. 44 (1994) 13

Anglim v. Missouri Pacific R.R. Co., 832 S.W.2d 298 (Mo.banc 1992), *cert. denied, Missouri Pacific R.R.Co. v. Anglim*, 506 U.S. 1041 (1992) 12

Ballentine v. Central R.R. of New Jersey, 460 F.2d 540 (3rd Cir. 1972), *cert. denied*, 409 U.S. 879 (1972) 9,10,14,22

Bonura v. Sea Land Service, Inc., 505 F.2d 665 (5th Cir. 1974) 10,18,22

Chesapeake & Ohio R.R. Co. v. Kelly, 241 U.S. 485 (1916) 8,9,14,17,19, 20,21,22,23,25

CSX Transportation, Inc. v. Casale, 441 S.E.2d 212 (Va. 1994) 12,23,24

DiSabatino v. National R.R. Passenger Corp., 724 F.2d 394 (3rd Cir. 1984) 9,10,14,22

Duncan v. St. Louis-San Francisco Ry. Co., 480 F.2d 79 (8th Cir. 1973), *cert. denied, St. Louis-San Francisco Ry. Co.*, 414 U.S. 859 (1973) 10,18,22

Gorniak v. National R.R. Passenger Corp., 389 F.2d 481 (3rd Cir. 1989) 9,10,14,22

Heater v. C&O Ry. Co., 497 F.2d 1243 (7th Cir. 1973), *cert. denied, C&O Ry. Co.*, 419 U.S. 1013 (1974) 10,18,22

Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) 8

Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988) 8,9,11,14, 15,17,21,22

Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980) 19,22,24

Pennsylvania R.R. Co. v. McKinley, 288 F.2d 262 (6th Cir. 1961) 10,18,22

Reusch v. Seaboard System R.R., 566 So.2d 489 (Ala. 1990), *cert. denied*, 498 U.S. 1012 (1990) 12,22,23

St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985) 2,9,14,17, 21,22,24,25

Steven v. Bangor and Aroostook R.R. Co., 97 F.3d 594 (1st Cir. 1996) 14

Williams v. Missouri Pacific R.R. Co., 11 F.3d 132 (10th Cir. 1993) 14,16

H.R. Rep. No. 1386, 60th Cong., 1st Sess., 3 (1908) 19,23

PETITION FOR A WRIT OF CERTIORARI

The petitioner, The Burlington Northern & Santa Fe Railway Company, formerly known as Burlington Northern Railroad Company, ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the state court judgment in the proceeding below pursuant to 28 U.S.C. § 1257 (a) (1996).

CITATIONS OF OPINIONS AND ORDERS BELOW

The Circuit Court in the City of St. Louis entered judgment after a jury verdict on July 20, 1995 in *Kenneth Byrd v. Burlington Northern R.R. Co.*, Cause No. 922-09869 in the amount of One Million Three Hundred Thousand Dollars ($1,300,000.00). The judgment is attached hereto at A-1.

The Missouri Court of Appeal's opinion affirming the trial court's decision is published at *Kenneth Byrd v. Burlington Northern R.R. Co.*, 939 S.W.2d 416 (Mo.Ct.App. 1996). This opinion is attached hereto at A-3.

The Missouri Supreme Court issued an order on March 25, 1997 denying Petitioner Burlington Northern Railroad Company's application for transfer in *Kenneth Byrd v. Burlington Northern R.R. Co.*, Appeal No. 79694 (Mo. March 25, 1997). This order is attached hereto at A-10.

JURISDICTION

The respondent, Kenneth Byrd, ("Respondent") brought this action in the Circuit Court of the City of St. Louis under the provisions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§51-60 (1996). Following a jury trial, the Circuit Court of the City of St. Louis entered judgment on a jury verdict in favor of Respondent in the amount of One Million Three Hundred Thousand Dollars ($1,300,000.00) on July 20, 1995. Petitioner filed all appropriate post trial motions and then filed

a timely Notice of Appeal to the Missouri Court of Appeals on November 22, 1995.

The Missouri Court of Appeals had jurisdiction to hear the appeal under Article V, Section 3 of the Constitution of the State of Missouri. The Missouri Court of Appeals affirmed the trial court's judgment on December 10, 1996. Petitioner timely filed a Motion for Rehearing or, in the alternative, Motion to Transfer to the Missouri Supreme Court in the Missouri Court of Appeals on December 23, 1996. The Missouri Court of Appeals denied Petitioner's Motion for Rehearing and Motion to Transfer on February 5, 1997.

Petitioner timely filed an Application for Transfer in the Supreme Court of the State of Missouri on February 20, 1997. On March 25, 1997, the Supreme Court of Missouri issued an order which denied Petitioner's Application for Transfer. Under Rule 83.03 of the Missouri Rules of Civil Procedure, Petitioner was forbidden from filing a Motion for Reconsideration of the Court's action in refusing Petitioner's Application for Transfer.

This Court has jurisdiction to review this state court judgment under 28 U.S.C. § 1257 (a) because a final judgment or decree was entered in the highest court of the State of Missouri in which a decision could be had and this action involves a federally created cause of action under a federal statute, the FELA. Petitioner has exhausted all appellate remedies in the state of Missouri. This Court has previously issued a Writ of Certiorari and reviewed a decision of the Missouri Court of Appeals when the Missouri Supreme Court has refused to grant the petitioner's Application for Transfer. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985).

STATUTE INVOLVED

This case arises under the Federal Employers' Liability Act ("FELA") 45 U.S.C. §§ 51-60 (1996). Pursuant to Supreme

Court Rule 14, Petitioner has attached the pertinent text of the FELA in the appendix at A-81.

STATEMENT OF THE CASE

Respondent Kenneth Byrd ("Respondent") is a 51 year old man who started working for Petitioner in 1964. (Relevant portions of the Transcript on Appeal are attached hereto at A-18). On February 5, 1992, Respondent was working as a carman in Springfield, Missouri. (*Id.* at A-19). While repairing a rail car, Respondent injured his back. (*Id.* at A-20). Other than a brief return to work following the accident, Respondent has not returned to work. At the time of the accident, Respondent was earning approximately $40,000.00 annually. (*Id.* at A-25). At trial Respondent sought future pecuniary damages consisting of loss of earnings for the next 16 years. (Relevant portions of the Transcript on Appeal are attached hereto at A-25).

During voir dire of the jury panel Petitioner directed questions to the panel for the express purpose of determining whether any member of the jury panel knew how to determine the present value of future pecuniary damages. Two separate questions were asked. The first question:

> Is there anyone here who knows how to determine how much money would have to be invested today so that Ken Byrd would not lose any net wages for the rest of his working life? Is there anyone who knows how to do so?

(*Id.* at A-13). Only one panel member responded affirmatively and that panel member was stricken from the panel by Respondent. (*Id.* at A-13). Petitioner then asked the jury panel the additional question:

> Does anyone other than [Juror No. 00297] know how to reduce the future pecuniary damage at present value? Does anyone else know how to do that?

(*Id.* at A-14). No member of the panel responded affirmatively to the last question. (Relevant portions of the Transcript on Appeal are attached hereto at A-14).

Other than the one panel member who was struck by Respondent, none of the other panel members who were selected as jurors had employment duties in which the calculation of present value might be a matter of day to day concern. Juror No. 00479 was unemployed with a ninth grade education (Jury List is attached hereto at A-38 - A-42). Juror No. 01192 was a housekeeper with a ninth grade education (*Id.*). Juror No. 01176 was a construction worker with a twelfth grade education (*Id.*). Juror No. 00021 worked in a hospital with 13 years educational level (*Id.*). Juror No. 00643 was a secretary and had an educational level of twelve years (*Id.*). Juror No. 00222 was a Bi-State bus driver with an educational level of thirteen years. (*Id.*). Juror No. 00074 was a clerk with a 12th grade educational level. (*Id.*). Juror No. 00138 was unemployed and had a tenth grade education (*Id.*). Juror No. 00107 was unemployed and had a twelfth grade education (*Id.*). Juror No. 00238 was a blue collar worker with a twelfth grade education (*Id.*). Juror No. 00954 was a blue collar worker who had fourteen years of education (*Id.*). Only Juror No. 00417 was a white collar worker at a bank (*Id.*). However, Juror No. 00417 did not respond affirmatively to the question or requestion on present value. (Relevant portions of the Transcript on Appeal are attached hereto at A-13, 14).

Respondent's treating physician testified at trial that Respondent could not go back to work after the surgery as a carman. (*Id.* at A-15, 16). Respondent offered testimony that he hoped to work until he was 65. (*Id.* at A-25). Respondent estimated his earnings from the Railroad would have been Forty Thousand Dollars ($40,000.00) a year at age 49. (Relevant portions of the Transcript on Appeal are attached hereto at A-25).

Respondent offered no evidence or expert testimony concerning the present value of future pecuniary damages. Instead, in closing argument, Respondent's attorney calculated Respondent's future pecuniary damages at Forty Thousand Dollars ($40,000.00) a year times sixteen years (*Id.* at A-25). Respondent's attorney then stated: "I think the present value would be Six Hundred Forty Thousand Dollars. Forty thousand times sixteen years" (*Id.* at A-25). Other than this comment by counsel, no present value calculation was provided by Respondent.[1]

At the close of all evidence, Petitioner moved for a directed verdict on Respondent's future pecuniary damages because Respondent failed to produce evidence of the present value of Respondent's future pecuniary damages. (Petitioner's Motion for Directed Verdict at the Close of All Evidence is attached hereto at A-43). The trial judge denied Petitioner's Motion for Directed Verdict. (July 20, 1995 order from trial court is attached hereto at A-46).

During the Instruction conference, Respondent offered Instruction No. 8 which stated:

> If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future

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[1] Respondent also requested various other damages, including $118,000.00 in past lost wages, (Relevant portions of the Transcript on Appeal are attached hereto at A-25), $222,000.00 for the potential loss of a farm, (*Id.* at A-26), $650,000.00 for pain and suffering, (*Id.* at A-26), and lost fringe benefits of $114,000.00. (*Id.* at A-26). Itemized damage awards are not permitted under Missouri law. *71.02 Missouri Rules of Civil Procedure.*

> as a result of the occurrence mentioned in the evidence. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax.

M.A.I. 8.02. (Instruction No. 8 is attached hereto at A-47).

Petitioner objected to Instruction No. 8 on the grounds that there was no evidence of the present value of future pecuniary damages and that the jury had indicated that they could not determine the present value of future damages. (Relevant portions of the Transcript of Record are attached hereto at A-31). Furthermore, there was no evidence on this issue presented by the Respondent who was offering this instruction and thus no basis for giving this instruction. (Relevant portions of the Transcript of Record are attached hereto at A-32). Petitioner then offered a withdrawal instruction. (*Id.* at A-35). Instruction F stated:

> The issue of Plaintiff's future wage loss and other future pecuniary damages is withdrawn from the case and you are not to consider such evidence in arriving at your verdict.

(Instruction F is attached hereto at A-48). The trial court refused this instruction. (Relevant portions of the Transcript of Record are attached hereto at A-35).

On July 20, 1995, the jury returned a verdict in favor of Respondent in the amount of One Million Three Hundred Thousand Dollars ($1,300,000.00). (Jury Verdict is attached hereto at A-49). The trial court entered a judgment on July 20, 1995 against Petitioner in the amount of One Million Three Hundred Thousand Dollars ($1,300,000.00). (Judgment is attached hereto at A-1). Petitioner timely filed a Motion for New Trial or in the alternative, Motion for Judgment Notwithstanding the Verdict which was denied by the trial court on November 14, 1995. (November 14, 1995 trial court order is

attached hereto at A-50). Petitioner then filed a timely Notice of Appeal to the Missouri Court of Appeals, Eastern District on November 22, 1995. (Notice of Appeal is attached hereto at A-51).

The Missouri Court of Appeals affirmed the trial court's judgment on December 10, 1996. (Opinion is attached hereto at A-3). Petitioner timely filed a Motion for Rehearing or, in the alternative, Motion to Transfer to the Missouri Supreme Court in the Missouri Court of Appeals on December 23, 1996. (Petitioner's Motion is attached hereto at A-52). The Missouri Court of Appeals denied Petitioner's Motion for Rehearing and Motion to Transfer on February 5, 1997. (February 5, 1997 Order is attached hereto at A-63).

Petitioner timely filed an Application for Transfer in the Supreme Court of the State of Missouri on February 20, 1997. (Petitioner's application is attached hereto at A-70). On March 25, 1997, the Supreme Court of Missouri issued an order which denied Petitioner's Application for Transfer. (March 25, 1997 Order is attached hereto at A-10). Under Rule 83.03 of the Missouri Rules of Civil Procedure, Petitioner was prohibited from filing a Motion for Reconsideration of the Court's action in refusing Petitioner's Application for Transfer.

REASONS FOR ISSUING THE WRIT OF CERTIORARI

INTRODUCTION

Over eighty years ago, this Court held that an award of future pecuniary damages in a Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1996) ("FELA") action must be reduced to present value. *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485, 491 (1916). While this Court has recognized that computing present value may be a difficult mathematical computation for the ordinary juryman, this Court has repeatedly held since Kelly that it is the fact finder's duty to make this computation. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983); *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 341 (1988). The issue raised in this case is whether the plaintiff in an action under the FELA has the burden to assist the jury by producing evidence related to the present value of his future pecuniary damages so that the jury may actually determine the present value of the plaintiff's future pecuniary damages. This Court has never addressed this issue, and a split has developed in the both the federal circuit courts and among the state supreme courts.

Moreover, this case presents the burden of proof issue under a unique set of facts which highlights the importance and substantive impact of the issue. The voir dire of the jury revealed that no juror knew how to calculate the present value of future pecuniary damages. Therefore, it was clear after voir dire that without the assistance of some evidence relating to the present value of Respondent's future pecuniary damages, the jury would be unable to calculate the present value of Respondent's future pecuniary damages. However, the trial court allowed Respondent to submit his future pecuniary damages to the jury when the Respondent offered absolutely no evidence relating to the present value of his future pecuniary damages. The Missouri Court of Appeals affirmed the trial

court's decision. The Missouri Court of Appeals' decision in this case circumvents the present value rule as articulated by this Court because the practical reality of the Missouri Court of Appeals' decision is that Respondent was allowed to recover his future pecuniary damages in a FELA action without a reduction to present value which is clearly in violation of this Court's establish precedent for over eighty years. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988); *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985); *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485, 491 (1916).

I. This Court Should Issue A Writ Of Certiorari To Determine Whether Respondent Had The Burden To Produce Evidence Relating To The Present Value Of His Fiture Pecuniary Damages Because There Is A Clear Split In The Federal Circuit Courts And Among The State Supreme Courts On This Issue

A. There Is A Clear Conflict Between The Decisions Of The Federal Circuit Courts

The federal circuit courts have given conflicting answers on whether the plaintiff in a FELA action has the burden of proof to present evidence relating to the present value of future pecuniary damages. The Third Circuit has consistently held that a plaintiff has the burden of proof. *Ballentine v. Central R.R. of New Jersey*, 460 F.2d 540 (3rd Cir. 1972), *cert. denied*, 409 U.S. 879 (1972); *DiSabatino v. National R.R. Passenger Corp.*, 724 F.2d 394 (3rd Cir. 1984); *Gorniak v. National R.R. Passenger Corp.*, 389 F.2d 481 (3rd Cir. 1989). The *Ballentine* court reasoned that "the application of the present worth rule is generally conceded to be beyond the understanding and capabilities of most lay persons serving on juries." *Ballentine*, 460 F.2d at 543. Therefore, "once evidence is presented and recovery is sought for future lost earning, the jury is entitled to

receive mathematical guidance on the method of reducing lost future earnings to present worth." *Ballentine*, 460 F.2d at 544. The burden to produce this mathematical guidance is on the plaintiff. *Ballentine v. Central R.R. of New Jersey*, 460 F.2d 540 (3rd Cir. 1972), *cert. denied*, 409 U.S. 879 (1972); *DiSabatino v. National R.R. Passenger Corp.*, 724 F.2d 394 (3rd Cir. 1984); *Gorniak v. National R.R. Passenger Corp.*, 389 F.2d 481 (3rd Cir. 1989).

On the other hand, the Fifth, Sixth, Seventh, and Eighth Circuits have held that the defendant has the burden to produce evidence relating to the present value of future pecuniary damages. *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665 (5th Cir. 1974); *Pennsylvania R.R. Co. v. McKinley*, 288 F.2d 262 (6th Cir. 1961); *Heater v. C&O Ry. Co.*, 497 F.2d 1243 (7th Cir. 1973), *cert. denied, C&O Ry. Co.*, 419 U.S. 1013 (1974); *Duncan v. St. Louis-San Francisco Ry. Co.*, 480 F.2d 79 (8th Cir. 1973), *cert. denied, St. Louis-San Francisco Ry. Co.*, 414 U.S. 859 (1973). These Circuits have reasoned that there is no reason to require a plaintiff to present evidence of present value because it is proper to presume that jurors are intelligent enough to make present value calculation without the assistance of evidence. *Bonura*, 505 F.2d at 669; *McKinley*, 288 F.2d at 265; *Heater* 497 F.2d at 1250; and *Duncan*, 480 F.2d at 87. These Circuits have held that if the defendant wants evidence produced relating to the present value of plaintiff's future pecuniary damages it is the defendant's burden to produce the evidence.

The Ninth Circuit has implicitly agreed with the Third Circuit that jurors in a FELA case need assistance in determining the present value of future pecuniary damages. However, the Ninth Circuit has split the burden of proof and held that the plaintiff has the burden to produce evidence about the need to adjust a lump sum award for inflation, and the defendant has the burden to produce evidence about the need to discount a lump sum award because of the effect of interest rates. *Alma v. Manufac-*

turers Hanover Trust, 684 F.2d 622 (9th Cir. 1982). The Ninth Circuit did not explain why it split the burden of proof.

There is no clear answer in the Fourth Circuit because the one decision which addressed the issue was vacated and remanded for further consideration in light of *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988). *Aldridge v. Baltimore and Ohio R.R. Co.*, 789 F.2d 1061 (4th Cir. 1986), *aff'd*, 814 F.2d 157 (4th Cir. 1987)(en banc), *vacated, remanded Chesapeake and Ohio Ry. Co. v. Aldridge*, 486 U.S. 1049 (1988), *rev'd Aldridge v. Baltimore and Ohio R.R. Co.*, 866 F.2d 111 (4th Cir. 1989). The Fourth Circuit agreed with the Third Circuit that the principle of present worth is beyond the understanding and capabilities of most lay persons serving on a jury, and that evidence should be admitted to assist the jury. *Aldridge*, 789 F.2d at 1068. However, the Fourth Circuit agreed with the Ninth Circuit that the burden of producing evidence relating to the present value of plaintiff's future pecuniary damages should be split between the plaintiff and the defendant. *Aldridge*, 789 F.2d at 1067. Therefore, the Fourth Circuit reasoned that the defendant in the case was not entitled to an instruction that the plaintiff's future pecuniary damages should be reduced to present value because the defendant failed to introduce any evidence to support the instruction. *Aldridge*, 789 F.2d at 1068. As stated above, this decision was vacated by this Court in *Chesapeake and Ohio Ry. Co. v. Aldridge*, 486 U.S. 1049 (1988).

B. There Is A Clear Conflict Between The Decisions Of The State Supreme Courts

Likewise, the decisions on this issue in the highest courts of various states have resulted in conflicting opinions on the issue of whether the plaintiff in a FELA case must present evidence of the present value of future pecuniary damages in order to recover future pecuniary damages. Many of the state court decisions have noted that they must establish their own rule

because the United States Supreme Court has not decided the issue and the federal circuit courts are in conflict on the question. *See CSX Transportation, Inc. v. Casale*, 441 S.E.2d 212, 215 (Va. 1994). Generally, there are three different and conflicting opinions in the state courts on the issue of which party has the burden to produce evidence relating to the present value of the plaintiff's future pecuniary damages.

The Supreme Court of Alabama in *Reusch v. Seaboard System R.R.*, 566 So.2d 489 (Ala. 1990), *cert. denied*, 498 U.S. 1012 (1990), has held that the plaintiff in a FELA action has the burden to produce evidence relating to the present value of future pecuniary damages. The *Reusch* court affirmed a trial court's decision to withdraw the issue of the plaintiff's future pecuniary damages from the jury's consideration because the plaintiff did not produce sufficient evidence to sustain a claim for future pecuniary damages. However, in stark contrast to the *Reusch* decision, the Virginia Supreme Court has placed the burden to produce evidence relating to the present value of a FELA plaintiff's future pecuniary damages on the defendant. *CSX Transportation, Inc. v. Casale*, 441 S.E.2d 212, 216 (Va. 1994).

The Missouri Supreme Court has held that neither party needs to produce any evidence because "[i]n the absence of any contrary indication, we can assume each juror in his or her respective fashion complied with the instruction and determined the present value of future wage loss." *Anglim v. Missouri Pacific R.R. Co.*, 832 S.W.2d 298, 309 (Mo.banc 1992), *cert. denied, Missouri Pacific R.R. Co. v. Anglim*, 506 U.S. 1041 (1992). In Missouri, either party is free to offer evidence relating to the present value of the plaintiff's future wages loss, "but whether or not such evidence is offered, the subject is open to jury instruction if requested and to jury argument." *Anglim*, 832 S.W.2d at 309.

C. This Court Should Issue A Writ of Certiorari To Resolve This Conflict Between The Federal Circuit Courts And Among The State Supreme Courts Because This Is An Issue Of Substantive Law Which Needs A Decisive Answer From This Court

This Court has recognized that the issue of which party has the burden of proof is a matter of substance which should be decided under federal law and should not be left to the law of the forum. *American Dredging Co. v. Miller,* 510 U.S. 443, 454 (1994). However, the answer to the question of which party has the burden to produce evidence relating to the present value of the plaintiff's future pecuniary damages in a FELA action is currently dependent on the law of the forum. As shown above there are three different opinions in the federal circuit courts, and the state courts are making up their own rules. The state courts are bound to follow federal law, but they currently have no clear guidance from the federal courts.

This case clearly presents the substantive issue of which party has the burden of proof to this Court and, unlike prior cases, the issue was preserved for this appeal. Petitioner moved for a directed verdict at the close of all evidence on the issue of Respondent's future pecuniary damages. Petitioner further made a timely request for an instruction withdrawing the issue of Respondent's future pecuniary damages from the consideration of the jury. Therefore, consistent with Rule 10 of the Supreme Court rules, this Court should issue a Writ of Certiorari in this case because Petitioner is presenting a substantive issue to this court which has caused a conflict between the federal circuit courts and a conflict among the state supreme courts.

D. This Court Should Approve The Third Circuit's Approach Because The Third Circuit's Approach Better Comports With Standard Tenets Of Our Judicial System And Wtih This Court's Previous Decisions

The Third Circuit has consistently placed the burden to produce evidence relating to the present value of a FELA plaintiff's future pecuniary damages on the plaintiff. *Ballentine*, 460 F.2d at 544; *DiSabatino*, 724 F.2d at 395; *Gorniak*, 389 F.2d at 486. This Court should approve the Third Circuit's approach because the Third Circuit's approach better comports with standard tenets of our judicial system and with this Court's previous decisions.

It has long been settled in our system of justice that in a FELA action "[t]he burden rests upon the plaintiff to establish by sufficient evidence a factual basis for the amount of damages sought." *Williams v. Missouri Pacific R.R. Co.*, 11 F.3d 132, 135 (10th Cir. 1993), *citing Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916). *See Also, Steven v. Bangor and Aroostook R.R. Co.*, 97 F.3d 594, 598 (1st Cir. 1996). Petitioner would not expect Respondent to argue this point. The next step then is to look at this Court's prior decisions relating to the recovery of future pecuniary damages in a FELA action to determine what is the proper amount of future pecuniary damages for which a plaintiff must present a sufficient factual basis.

This court has always held that a plaintiff in a FELA action is only entitled to recover the present value of future pecuniary damages. *Morgan*, 486 U.S. at 335; *Dickerson*, 470 U.S. at 411. This Court has reasoned that a plaintiff in a FELA action is not entitled to future pecuniary damages in one lump sum without a reduction to present value because such a recovery would be "more than compensation." *Kelly*, 241 U.S. at 491.

Therefore, the logical conclusion is that if a plaintiff in a FELA action seeks to recover future pecuniary damages, the plaintiff must prove the present value of future pecuniary damages because that is what entitles the plaintiff to recover the future pecuniary damages in one lump sum. Proving the present value of future pecuniary damages should be considered a material element of a FELA plaintiff's claim. *See, Aldridge v. Baltimore and Ohio R.R. Co.*, 789 F.2d 1061, 1068 (4th Cir. 1986) (Boyle, J. concurring).

The Fifth, Sixth, Seventh, Eighth and Ninth Circuits' decisions which have held that the defendant has part or all of the burden to produce evidence relating to the present value of the plaintiff's future pecuniary damages are of questionable authority after this Court's vacation and remand in *Chesapeake and Ohio Ry. Co. v. Aldridge*, 486 U.S. 1049 (1988). In *Aldridge*, *supra*, this court implicitly held that a defendant does not have the burden to produce evidence relating to the present value of Respondent's future pecuniary damages. This Court vacated the Fourth Circuit's opinion which held that a defendant was not entitled to a present value instruction because the defendant failed to satisfy its burden of proof to support the instruction. This Court found that the Fourth Circuit's decision was inconsistent with *Morgan*, 486 U.S. at 330. On remand, the Fourth Circuit held that the defendant railroad was entitled to an instruction on present value even though it produced absolutely no evidence relating to the present value of the plaintiff's future pecuniary damages. *Aldridge*, 866 F.2d at 111.

The clear implication of *Aldridge*, 486 U.S. at 1049 was that a defendant does not have the burden of producing evidence related to the present value of a FELA plaintiff's future pecuniary damages. In fact, this decision can not be read any other way without violating another standard tenet of our judicial system. As the Fourth Circuit recognized in this case a party that has the burden of proof on an issue may not obtain an instruction on that

issue without evidence to support the instruction. *Aldridge*, 789 F.2d at 1066. Consistent with this standard tenet of our judicial system, this Court would not have allowed the defendant railroad in *Aldridge* to obtain a present value instruction without producing any evidence to support the instruction unless the defendant railroad did not have the burden of proof on the issue.

Furthermore, the Fifth, Sixth, Seventh, Eighth and Ninth Circuits' decisions are poorly reasoned. These circuits have argued that the defendant should have the burden to produce evidence relating to the present value of a FELA plaintiff's future pecuniary damages because it is unfair to force the plaintiff to reduce his damages. However, the reasoning is flawed because there is no real reduction in the amount of damages to which the plaintiff is entitled. A FELA plaintiff has never been entitled to recover the gross amount of future pecuniary damages in one lump sum without a reduction to present value. Therefore, the plaintiff does not lose any amount of money to which he would have been entitled when a reduction to present value is made. Forcing the plaintiff to reduce the total amount of future pecuniary damages to the present value is not reducing damages, rather, it is forcing the plaintiff to prove the amount of damages to which the plaintiff is entitled to recover. There is nothing unfair about forcing a plaintiff to prove his amount of damages. *Williams v. Missouri Pacific R.R. Co.*, 11 F.3d 132, 135 (10th Cir. 1993).

For the same reason, the present value rule is also not similar to a mitigation of damages situation as several federal circuit court have attempted to analogize. In the mitigation of damages situation, the plaintiff has the burden to prove his damages. Once the plaintiff has proven the exact amount of damages, the plaintiff is entitled to recover that exact amount of damages. Therefore, if the defendant wants a reduction, it is the defendant's burden to affirmatively come forth with evidence of mitigation or the failure to mitigate to get plaintiff's damages reduced. If

the defendant does not come forward with any evidence the plaintiff will be entitled to the exact amount of damages which the plaintiff proved through evidence.

In a future pecuniary damages situation, even if the plaintiff proves the gross amount of future pecuniary damages, the plaintiff is still not entitled to recover the gross amount of the future pecuniary damages in one lump sum. As a matter of law, the plaintiff's gross amount of future pecuniary damages in a FELA action must be reduced to present value. *Monessen Southwestern Ry. Co.v. Morgan*, 486 U.S. 330, 335 (1988); *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). If the plaintiff is permitted to recover the gross amount of the future pecuniary damages, then the plaintiff would be allowed to recover "more than compensation." *Chesapeake & Ohio R.R. v. Kelly*, 241 U.S. at 491. Therefore, as a matter of law, the defendant is entitled to the reduction in the gross amount of plaintiff's future pecuniary damages without any affirmative action on the part of the defendant. This Court has held that even if the defendant produces no evidence of the present value of the future pecuniary damages, the law still requires that the jury be instructed to determine the present value of the future pecuniary damages. *Aldridge*, 486 U.S. at 1049.

The difference is clear. In a mitigation of damages situation, if the defendant does not affirmatively come forth with any evidence relating to mitigation of damages, the plaintiff will be entitled to recover whatever amount of damages the plaintiff proved. In a future pecuniary damages situation, even if the defendant does not come forth with any evidence relating to the present value of the future pecuniary damages, the plaintiff's future pecuniary damages must still be reduced to present value.

The Fifth, Sixth, Seventh and Eighth Circuits' decisions which have placed the full burden of presenting evidence relating to the present value of a FELA plaintiff's future pecu-

niary damages on the defendant are clearly distinguishable from the facts of this case. The Fifth, Sixth, Seventh and Eighth Circuits' decisions are based on the presumption that jurors are capable enough to reduce future pecuniary damages to present value intelligently if they are instructed to perform this function. *Bonura*, 505 F.2d at 669; *McKinley*, 288 F.2d at 265; *Heater*, 497 F.2d at 1250; *Duncan*, 480 F.2d at 87. However, there is no issue in this case about whether the jurors could or could not determine the present value of Respondent's future pecuniary damages. The jurors in this case admitted during voir dire that they were not able to reduce future pecuniary damages to present value. Any presumption to the contrary was effectively rebutted by the voir dire examination. Therefore, the Fifth, Sixth, Seventh and Eighth Circuits' decisions are clearly distinguishable from the facts of this case.

Finally, it would be extremely unfair to require a defendant to produce evidence to prove the present value of a plaintiff's future pecuniary damages. A defendant would then be required to assist a plaintiff in proving damages under this scenario. It would be the plaintiff's burden to produce evidence of the gross amount of future pecuniary damages. The defendant would then be forced to prove the actual amount which plaintiff is entitled to recover. This would drastically affect a defendant who wanted to argue that the plaintiff was not entitled to recover any future pecuniary damages, and it would force all defendant's to give the jury an exact amount which the plaintiff would be entitled to recover. This Court has never required a defendant to assist a plaintiff in proving damages.

For these reasons, this Court should issue a Writ of Certiorari to resolve the conflict between the federal circuit courts and among the state supreme courts on the issue of which party has the burden to produce evidence relating the present value of plaintiff's future pecuniary damages. There needs to be a decisive federal answer to this issue because substantive issues in FELA cases are to be decided by federal law. Currently, the

answer to this issue is dependent on the law of the forum where the plaintiff brings the action. One of the purposes of the FELA was to create uniformity throughout the union with respect to railroads's financial responsibility for injuries to their employees. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 493 (1980), *citing* H.R. Rep. No. 1386, 60th Cong., 1st Sess., 3 (1908). Therefore, this Court should issue a Writ of Certiorari and decide once and for all that the plaintiff in a FELA action has the burden to produce evidence relating to the present value of future pecuniary damages because this comports with standard tenets of our judicial system and with this Court's prior cases.

II. This Court Should Issue A Writ Of Certiorari Because The Missouri Court Of Appeals' Decision In This Case Circumvents This Court's Long Established Rule That Future PEcuniary Damages In A FELA Case Should Be Reduced To Their Present Value In That Respondent Was Allowed To Recover His Future Pecuniary Damages When It Was Clear From The Voir Dire Of The Jury Panel That The Jury Would Be Unable To Reduce Respondent's Future Pecuniary Damages To Present Value

A. This Court Has Consistently Reaffirmed That A FELA Plaintiff Is Only Entitled To Recover The Present Value Of His Future Pecuniary Damages

This court first articulated the present value rule in *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485, 491 (1916) as follows:

> when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of the their present value only.

The *Kelly* Court reasoned that damages in a FELA case are meant to be compensatory and awarding future damages in one lump sum without taking into account the earning power of the money would afford the plaintiff "more than compensation". *Kelly*, 241 U.S. at 489. The *Kelly* court noted "it may be a difficult mathematical computation for the ordinary juryman to calculate," however, the Court held that it was the jury's job to make this calculation.

This Court has consistently re-affirmed the present value rule in FELA cases. This Court has held that a state court may not circumvent the present value rule by refusing to instruct the jury about the present value rule when a present value instruction is requested by the defendant. *Dickerson*, 470 U.S. at 411. This Court has also held that a state court may not circumvent the present value rule by instructing the jury that it is conclusively presumed under state law that future inflation would equal future interest rates, and, therefore, there is no need to reduce to present value. *Morgan*, 486 U.S. at 335. Furthermore, this Court held that a federal court may not circumvent the present value rule by placing the burden of presenting evidence of the present value of plaintiff's future pecuniary damages on the defendant and then refusing to instruct on the present value rule because the defendant failed to produce evidence relating to the present value of plaintiff's future pecuniary damages. *Aldridge*, 486 U.S. at 1049.

B. This Missouri Court of Appeals' Decision Circumvents This Court's Established Precedent That Future Pecuniary Damages In A FELA Action Must Be Reduced To Present Value

The Missouri Court of Appeals' decision in this case circumvents the present value rule because Respondent was allowed to recover his future pecuniary damages without a reduction to present value which is clearly in violation of this Court's

establish precedent for over eighty years. *Morgan*, 486 U.S. at 335; *Dickerson*, 470 U.S. at 411; *Kelly*, 241 U.S. at 491. The voir dire of the jury revealed that no juror knew how to calculate the present value of future wage loss. The Respondent struck the only juror which was capable of making a present value calculation. The Respondent then offered no evidence whatsoever relating to the present value of his future pecuniary damages. It was impossible for this jury to calculate the present value of Respondent's future pecuniary damages. However, the Missouri Court of Appeals still affirmed the trial court's decision to allow Respondent to recover his future pecuniary damages.

The Missouri Court of Appeals left the present value calculation to the common knowledge of the jury which had no knowledge how to calculate present value, and then assumed that the jury would determine the present value of Respondent's future pecuniary damages. This decision drastically undermines the present value instruction and essentially makes it meaningless in Missouri. This would be similar to instructing the jury to deliberate in spanish when no one on the jury knows any spanish. The instruction would be worthless. If this decision is allowed to stand, future FELA plaintiffs in Missouri can strike any juror who knows how to calculate present value and avoid the effect of the present value rule. This Court should issue a Writ of Certiorari in this case because the Missouri Court of Appeals has circumvented the present value rule and rendered it meaningless in Missouri.

III. This Court Should Issue A Writ Of Certiorari Because This Case Also Involves Questions Relating To The Proper Measure Of Damages In A FELA Action And To the Propriety Of Jury Instructions Relating To The Proper Measure Of Damages In A FELA Action

This Court has consistently held that when an issue relating to the proper measure of damages in a FELA action is raised in

a state court proceeding the issue is a matter of substantive law which should be determined by federal law. *Morgan*, 486 U.S. at 335; *Dickerson*, 470 U.S. at 411; *Liepelt*, 444 U.S. at 493; *Kelly*, 241 U.S. at 491. This case raises an issue concerning the proper measure of damages in a FELA case, more specifically, whether Respondent was entitled to recover damages for future pecuniary damages under the FELA when the Respondent failed to present any evidence of the present value of his future pecuniary damages.

As shown above, there is a split in the federal circuit courts and among the state supreme courts. In the Third Circuit a plaintiff would not be entitled to recover future pecuniary damages without presenting sufficient evidence relating to the present value of the future pecuniary damages. *Ballentine*, 460 F.2d at 544; *DiSabatino*, 724 F.2d at 395; *Gorniak*, 389 F.2d at 486. In the Fifth, Sixth, Seventh and Eighth Circuits the plaintiff would be entitled to recover future pecuniary damages without presenting any evidence relating to the present value of the future pecuniary damages. *Bonura*, 505 F.2d at 669; *McKinley*, 288 F.2d at 265; *Heater*, 497 F.2d at 1250; *Duncan*, 480 F.2d at 87.

Furthermore, there is a clear split in the state courts. The Supreme Court of Alabama in *Reusch v. Seaboard System R.R.*, 566 So.2d 489 (Ala. 1990), *cert. denied*, 498 U.S. 1012 (1990), affirmed a trial court's decision to withdraw the issue of a plaintiff's future pecuniary damages in a FELA action from the jury's consideration because the plaintiff failed to present sufficient evidence to sustain a claim for future pecuniary damages. However, the Virginia Supreme Court affirmed a trial court's decision to allow a plaintiff in a FELA action to reject the defendant's effort to eliminate the plaintiff's future pecuniary damages claim from the jury's consideration because the court held that it is the defendant who has the burden to produce evidence relating to the present value of plaintiff's damages.

CSX Transportation, Inc. v. Casale, 441 S.E.2d 212, 216 (Va. 1994).

It is important to note, Petitioner is not asking this Court to address what kind of evidence Respondent should have produced to show the present value of his future pecuniary damages. Instead, Petitioner is asking this Court to determine whether Respondent was required to produce any evidence relating to the present value of his future pecuniary damages in order to recover damages for his future pecuniary damages. As this Court first noted in *Kelly*, questions of procedure and evidence are to be determined by the law of the forum,

> But, the question of the proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employer's Liability Act it must be settled according to general principles of law as administered in the Federal Courts.

Kelly, 241 U.S. at 491.

Therefore, the issue raised in this case should be answered under federal law because the issue relates to the proper measure of damages under the FELA, not what evidence should be produced. However, this Court has never addressed the issue, and the federal courts and state courts are split in their decisions. Currently, the answer to the question of whether a FELA plaintiff is entitled to recover damages for future pecuniary damages is dependent on the law of the forum where the plaintiff brings the action. This conflicts with the uniformity goal of the FELA. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 493 (1980), *citing* H.R. Rep. No. 1386, 60th Cong., 1st Sess., 3 (1908). Therefore, this Court should issue a Writ of Certiorari in this case to resolve this issue of substantive law which has caused a conflict between the federal circuit courts and among various state supreme courts.

Furthermore, this Court held in *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985) that "it is well settled that the propriety of jury instructions concerning the measure of damages in [a] FELA action is an issue of 'substance' determined by federal law." The Missouri Court of Appeals affirmed the trial court's decision to reject Petitioner's proffered withdrawal instruction when the voir dire of the jury revealed that no juror knew how to calculate the present value of future wage loss, no evidence of any type was presented at trial relating to a method of calculating present value, defendant timely objected to plaintiff's instruction submitting the issue of plaintiff's future pecuniary damages to the jury and defendant requested an instruction from the Court withdrawing the issue of plaintiff's future pecuniary damages from the jury's consideration.

There is a conflict in the state courts on the issue of whether a trial court should issue a withdrawal instruction of a FELA plaintiff's future pecuniary damages if the plaintiff fails to present evidence relating to the present value of the plaintiff's future pecuniary damages. The Supreme Court of Alabama in *Reusch v. Seaboard System R.R.*, 566 So.2d 489 (Ala. 1990), *cert. denied*, 498 U.S. 1012 (1990), affirmed a trial court's decision to instruct the jury that it could not award the plaintiff damages for his lost future earnings because the plaintiff did not produce sufficient evidence to sustain a claim for future pecuniary damages. However, the Virginia Supreme Court affirmed a trial court's decision to reject the defendant's effort to eliminate the plaintiff's future pecuniary damages claim from the jury's consideration because the court held that it is the defendant who has the burden to produce evidence relating to the present value of plaintiff's damages. *CSX Transportation, Inc. v. Casale*, 441 S.E.2d 212, 216 (Va. 1994). The issue of whether Petitioner's withdrawal instruction should have been given is a substantive issue which should have a decisive answer from this Court. *See St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985).

CONCLUSION

This case gives the Court the perfect vehicle to address an issue which has caused a conflict between the federal circuit courts and a conflict between the state courts. The issues raised in this Petition for a Writ of Certiorari were properly preserved, and are substantive issues which need a decisive answers from this court. Furthermore, this case highlights the need for an answer from this court because the jurors in this case were instructed to follow the law, but it was impossible for the jurors to follow the law as articulated by this court in *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485, 491 (1916). Wherefore, Petitioner respectfully requests that this Court issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

INDEX FOR APPENDIX

Trial Court's Judgment A-1

Missouri Court Of Appeals' Decision A-3

Missouri Supreme Court's Order Dated March 25, 1997 ..... A-10

Relevant Portions Of Transcript On Appeal A-12

Transcript Of Record A-28

Jury Sheets A-38

Defendant's Motion for Directed Verdict At The Close Of All Evidence A-43

Trial Court's Order Dated July 20, 1995 ..... A-46

Instruction No. 8 ..... A-47

Instruction No. F A-48

Verdict A-49

Trial Court's Order Dated November 14, 1995 ..... A-50

Notice of Appeal A-51

Burlington's Motion For Rehearing Or, In The Alternative, Motion To Transfer To The Supreme Court A-52

Burlington's Suggestions In Support Of Its Motion For Rehearing Or, In The Alternative, Motion To Transfer To The Supreme Court A-57

Missouri Court Of Appeals' Order Dated February 5, 1997 ..... A-63

Supreme Court Application For Transfer Cover Sheet . A-66

Supreme Court Certificate Of Service A-69

Application For Transfer To The Supreme Court And Suggestions In Support A-70

45 U.S.C. §§ 51-60 (1996) A-81

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Thursday,, JULY 20TH, 1995

Cause No. 922-09869

Division No. 6

KENNETH BYRD,
Plaintiff,

vs.

BURLINGTON NORTHERN R. R. CO.
Defendant.

JUDGMENT

This action came before this Court and a jury. The parties appeared in person and by their respective attorneys. The issues have been duly tried and the jury rendered its verdict.

VERDICT A

On the claim of the Plaintiff, Kenneth Byrd for personal injuries against the Defendant, Burlington Northern R. R. Co. the jury found in favor of the Plaintiff.

The jury found the total damages of the Plaintiff, disregarding any fault on the part of the Plaintiff to be $1,300,000.00 dollars and no cents.

WHEREFORE: it is hereby ordered and adjudged that the Plaintiff, have and recover of the Defendant, the sum of $1,300,000.00 dollars.

Cost of this action to be taxed against the Defendants.

SO ORDERED:

/s/ Mary K. Hoff
Circuit Judge 27385

7/20/95
Date Signed

[416]

Kenneth E. BYRD,
Plaintiff/Respondent,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant/Appellant.

No. 69550.

Missouri Court of Appeals,
Eastern District,
Division Two.

Dec. 10, 1996.

Motion for Rehearing and/or Transfer to Supreme Court
Denied Feb. 5, 1997.

Application to Transfer Denied
March 25, 1997.

Railroad employee who had injured his back while working on railroad car brought action against railroad under Federal Employers' Liability Act (FELA). The Circuit Court, City of St. Louis, Mary K. Hoff, J., entered judgment for employee for $1,300,000. Railroad appealed. The Court of Appeals, Gerald M. Smith, J., held that: (1) railroad was not entitled to withdrawal instruction regarding employee's instruction pertaining to future pecuniary damages; (2) railroad was not entitled to mitigation of damages instruction; and (3) railroad was not entitled to instruction regarding employer's actual or imputed knowledge of dangerous conditions.

Affirmed.

1. Employers' Liability key 262.1

Court properly instructed on present value of pecuniary damages in FELA case even though no evidence of present value was presented and voir dire allegedly established that no member of the jury knew how to calculate present value of wages. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Employers' Liability key 262.1

Instruction on present value of loss of future wages damages is mandatory in FELA action if requested by either party. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Employers' Liability key 212, 262.1

Either party may offer present value of loss of future wages damages evidence in FELA action, but whether such evidence is offered or not, subject is open to jury instruction, if requested, and to jury argument. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Employers' Liability key 212, 262.1

Railroad was not entitled to mitigation of damages instruction in former railroad carman's FELA action where at time of trial employee was still in healing period from back surgery related to his employment injury and his doctor did not consider it advisable for him to ever work as carman, when he sought to go back to work after his injury, he was unable to perform satisfactorily and was told by his supervisor not to return to work and in period prior to surgery only employment offered by railroad was job for which employee did not appear to be qualified and which would have cost him his seniority and benefits in his carman position. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

5. Appeal and Error key 204(2)

Railroad which did not object to testimony at trial failed to preserve alleged error in admission of evidence concerning injured railroad worker's possible loss of his farm due to his injury.

6. Employers' Liability key 56

Railroad was chargeable with actual or constructive knowledge of conditions facing employee when he was injured such that railroad was not entitled to jury instruction regarding employer's actual or imputed knowledge of dangerous conditions in FELA action where condition which caused employee's injury was not transient and railroad knew of dangers of sending men to do job without proper equipment when it sent employees to job site. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

[417]

William A. Brasher, Gerard F. Hempstead, Terry Buescher, Brasher Law Firm, St. Louis, for defendant/appellant.

Joseph L. Bauer, Jr., Michael L. Nepple, Bauer & Baebler, St. Louis, for plaintiff/respondent.

GERALD M. SMITH, Judge.

Defendant, Burlington Northern Railroad Company, appeals from a judgment against it of $1,300,000 based upon a jury verdict in this FELA case. We affirm.

Plaintiff, Kenneth Byrd, worked as a carman for the railroad. he had been so employed for 28 years except for a period of military service. He and a co-worker, Coble, were sent by their supervisor from the repair facilities in Springfield, Missouri to repair a gondola car in Columbus, Kansas, approximately 100 miles from Springfield. The gondola car was loaded with scrap

iron. The repair involved replacement of an air brake reservoir, located underneath the car and weighing 256 pounds. Plaintiff and Coble, although experienced carmen, had limited experience in replacing reservoirs of this kinds, particularly on a loaded car, by hand, away from the repair facility.

No mechanical lifting device or jack was provided to plaintiff and Coble for this job. Because the car was loaded they could not cut a hole in the bottom of the car and utilize the boom on their truck to move the new reservoir into position. They therefore sat on the ground and attempted to lift the reservoir into position. Coble weighed approximately 135 pounds; plaintiff in excess of 250 pounds. After placing one end of the reservoir into position they attempted to place the other end in place at which point the already placed end fell on plaintiff. He experienced immediate pain but he and Coble were able to place the reservoir into position and Coble secured it into place. Plaintiff immediately reported the injury when he returned to the repair shop in Springfield.

The injury precluded plaintiff from working as a carman, required surgery which only partially relieved his pain, and rendered him permanently disabled from performing work as a carman.

[1] Railroad makes no challenge to the sufficiency of the evidence to support the verdict. It raises five allegations of trial error. The first alleges error in giving plaintiff's instruction pertaining to future pecuniary damages and in the court's refusal to give defendant's withdrawal instructions of those damages. The point is based upon defendant's contention that no evidence was presented by plaintiff as to "present value" of such damages and that defendant's voir dire had established that no member of the jury was capable of determining "present value" of such damages.

[2, 3] An instruction on present value is mandatory in a FELA case if requested by either party. *Anglim v. Missouri Pacific Railroad Co.*, 832 S.W.2d 298 (Mo.banc 1992 [29,30], *cert. denied sub nom. Missouri Pacific R.R. Co. v. Anglim*, 506 U.S. 1041, 118 S.Ct. 831, 121 L.Ed.2d 701 (1992). Either party may offer present value evidence, but whether such evidence is offered or not, the subject is open to jury instruction if requested and to jury argument. *Id.* at [32]. *Anglim* relied upon *Bair v. St. Louis-San Francisco Ry. Co.*, 647 S.W.2d 507 (Mo.banc 1983), *cert. denied* 464 U.S. 830, 104 S.Ct. 107, 78 L.Ed.2d 109, for the proposition that the "fact that a dollar today is not the same thing as a dollar payable some years from now, is the matter of plainest fact which could be appropriately argued without the need for expert testimony." *Anglim, supra* at [31]. The *Anglim* court further noted that there is no single method for determining present value mandated by federal law. *Id.* at [32]. The court then held: "In the absence of any contrary indication, we can assume that each juror in his or her respective fashion complied with the instruction and determined the present value of future wage loss." *Id.*

Defendant contends that the first seven words of the last quoted sentence preclude an award of future pecuniary damages where no evidence is adduced of present value and none of the selected jurors on voir dire indicated knowledge of how to compute present value. It is apparent from the remainder of the quoted sentence that the court did antici- **[418]** pate that jurors may not have specific knowledge of how to compute present value but that each will in their "respective" ways determine what they believe "present value" to be. If defendant wishes to influence that determination it is free to present evidence to assist the jury. If it chooses not to, then it leaves that determination to the common knowledge of the jury. Defendant did not seek to provide the jury with assistance in this area. Further the non-itemized verdict of the jury does not enable us to determine what award it made for future pecuniary damages and whether or not

it made some adjustment for "present value". *Id.* at [32]. We find no error.

[4] Defendant next contends that the trial court erroneously refused to give defendant's requested mitigation of damages instruction. A defendant is entitled to a mitigation of damages instruction if there is evidence to support such an instruction. *Hawkes v. Norfolk & Western Railway Company*, 876 S.W.2d 705 (Mo.App.1994)[2]. The evidence here did not support a mitigation instruction. Plaintiff at the time of trial was still in his healing period from the back surgery and his doctor did not consider it advisable for him to ever work as a carman. When plaintiff sought to go back to work after his injury he was unable to perform satisfactorily and was told by his supervisor not to return to work until he was able to perform the full requirements of the carman position. In the period prior to the back surgery the only employment offered by the railroad was a job for which plaintiff did not appear to be qualified and which would have cost him his seniority in his carman position and additional benefits. We find no error in denying the requested mitigation instruction.

[5] In its third point the defendant asserts error in the admission of testimony concerning the possible loss of plaintiff's farm as a result of his injuries. An objection was made to earlier testimony given by a neighbor of plaintiff concerning the fact the farm was for sale. The court overruled that objection on the basis that the evidence was relevant to show that because of his injuries the plaintiff was no longer able to work the farm. Defendant made no objection to the testimony of plaintiff of which it now complains. The earlier testimony was relevant for the reason stated by the court in overruling the objection. Defendant was required to object to the testimony of the plaintiff of which it now complains if it believed the testimony was offered for a different and objectionable reason. The point has not been preserved.

[6] Defendant next premises error on the court's refusal to give MAI 24.01's knowledge paragraph, mandated in certain

cases by *Qualls v. St. Louis Southwestern Railway Company*, 790 S.W.2d 84 (Mo.banc 1990), *cert. denied sub nom. St. Louis Ry. Co. v. Qualls*, 499 U.S. 961, 111 S.Ct. 1685, 113 L.Ed.2d 650 (1991). In that case the court said the paragraph was not required if the judge decides the plaintiff has shown defendant had actual knowledge of the negligently produced condition. *Id.* at [4]. The knowledge paragraph is required where the plaintiff submits some act of negligence, constructive knowledge of which is not chargeable to the railroad. *Notes on Use*, MAI 24.01. *Qualls* involved transient conditions of ice and snow on a bridge.

The condition which caused plaintiff's injury was not transient. Two men were sent to replace a reservoir which weighed 256 pounds and were not supplied with a jack or other manual hoisting device. Reservoirs are located either under or on the end of the car. This is common knowledge in the railroad industry. The supervisor who sent plaintiff to the job site knew therefore that there was at least a fifty-fifty chance that the reservoir was under the car and would have to be manually replaced by two men without a jack. It is the business of a railroad to know whether its cars are empty or full, and therefore it had at least constructive knowledge that the boom on the truck could not be used to replace the reservoir if the reservoir was under the car. The evidence established that the railroad knew or should have known of the conditions facing plaintiff. It was chargeable with actual or constructive knowledge of the conditions which caused the accident. There was no fact issue as to the railroad's knowledge of the dangerous situa- **[419]** tion to which plaintiff was exposed. The court did not err in refusing the Qualls paragraph.

Defendant's final point premises error on the court allowing a portion of the plaintiff's closing argument. We are unable to perceive anything improper about the argument.

Judgment affirmed.

CRANE, P.J. and PUDLOWSKI, J., concur.

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
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THOMAS F. SIMON, CLERK

March 25, 1997

Mr. Gerard F. Hempstead
211 North Broadway, Suite 2300
St. Louis, Missouri 63102

In re: Kenneth E. Byrd vs. Burlington Northern Railroad Company

Supreme Court No. 79694

Dear Counsel:

This is to advise that the Court this day entered an order in the above-entitled cause, a copy of which is attached herewith.

Very truly yours,

THOMAS F. SIMON
/s/ Thomas F. Simon
Clerk

Attachment
cc: Joseph L. Bauer, Jr.

IN THE SUPREME COURT OF MISSOURI

No. 79694
E.D. No. 69550

January Session, 1997

Kenneth E. Byrd,
Respondent,
vs. (TRANSFER)
Burlington Northern Railroad Company,
Appellant.

Now at this day, on consideration of appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1997, and on the 25th day of March, 1997, in the above-entitled cause.

Given under my hand and seal
of said Court, at the City
of Jefferson, this 25th day
of March, 1997

/s/ Thomas F. Simon, Clerk

IN THE CIRCUIT COURT OF MISSOURI
EASTERN DISTRICT

NO. ED_____

KENNETH E. BYRD,
Respondent,

vs .

BURLINGTON NORTHERN RAILROAD
Appellant.

IN THE CIRCUIT COURT OF MISSOURI
CITY OF ST. LOUIS, DIVISION 6
THE HONORABLE MARY KATHRYN HOFF, JUDGE

NO. 922-9869

KENNETH E. BYRD,
Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD,
Defendant.

TRANSCRIPT ON APPEAL
(Volume I - Pages 1 - 180)

Mr. Joseph L. Bauer, Jr.
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Bernadine C. Dorsey, C.C.R.
Official Court Reporter - Division #6
St. Louis Circuit Courts

* * *

[89]

give you the instructions and then you deliberate up in the jury room before you come to any conclusion as to whether the Plaintiff is entitled to recover in this case? Is there anybody here who feels that they would not be able to keep an open mind and listen to all of the evidence before arriving at a conclusion as to who should win or who should lose in this case? I take it by your silence you feel that you all can do that. Now, you heard Mr. Bauer mentioned that there may be a claim here and there will be a claim here from Mr. Bauer's viewpoint for loss wages for Mr. Byrd. Now i 9 there anyone here who knows how to determine how much money would have to be invested today so that Ken Byrd would not lose any net wages for the rest of his working life? Is there anybody here who knows how to do that? Okay. That's Ms. Chastain?

VENIREMAN CHASTAIN: Uh-huh.

MR. HEMPSTEAD: Okay. Anybody else other than Ms. Chastain knows how to do that? Okay. Now, the Plaintiff in this case was injured and there may be a natural tendency to be sympathetic to the Plaintiff because of his injury. But in this case there is evidence and then there's law that the Court gives you to determine whether the Plaintiff is

* * *

[113]

VENIREMAN ALLEN: Yes, sir.

MR. HEMPSTEAD: Everybody agree with that? If the evidence shows that there was no negligence on the part of the

Railroad, is there anybody here who would not be able to return a verdict in favor of my client, the Burlington Northern Railroad, if the evidence showed that? I take it everybody would be able to do that. Okay. Ms. Chastain mentioned that she works as a financial planner.

VENIREMAN CHASTAIN: Stockbroker.

MR. HEMPSTEAD: Stockbroker. Does anyone other than Ms. Chastain know how to reduce a future pecuniary damage at present value? Does anybody else know how to do that? Okay. Thank you, very much.

Thank you, Your Honor.

THE COURT: Thank you. Ladies and gentlemen, I'm going to be speaking to the attorneys at side bar right now. I'm going to ask that you — you can stand up if you like but you need to keep your voices down or not talk at all because we're going to need to make a record. After we finish making that record, we're going to take a break for the attorneys to make their strikes. Could I see the attorneys at side bar?

(Counsel approached the bench and the following **[114]** proceedings were had:)

MR. HEMPSTEAD: The answer to the last question, there was no response to the answer — to the last question.

THE COURT: Okay.

MR. HEMPSTEAD: The answer was a negative.

THE COURT: Ms. Hogan, would you come up here for a moment please

(At this time, Juror Number 138, Venireman Camilla Hogan, approached the bench with counsel and the following proceedings were had:)

THE COURT: Ms. Hogan come on up here. Sorry. Ma'am, sometimes the information we get on our sheet is not accurate but I need to ask you a question because of the way that it's come out on the sheet. It indicates that you could have a felony conviction, is that correct or is that just a mistake?

VENIREMAN HOGAN: I was — I never been convicted of nothing.

THE COURT: All right.

VENIREMAN HOGAN: Okay. I was — I don't know what a felony is.

THE COURT: You don't know what what is?

VENIREMAN HOGAN: What I suppose to be

* * *

[463]

disc for which you treated him and the back injury?

A. I have an opinion.

Q. What's your opinion?

A. Ultimately, I think that was the cause of

it.

Q. Doctor is that opinion to a reasonable degree of medical certainty?

A. Yes, sir.

Q. Doctor in your private practice as an orthopedic surgeon have you for a time worked conducting physical exams on behalf of a Railroad?

A.I have done that in the past.

Q.And are you familiar with the job duties of a car man?

A.Generally.

Q.And what Railroad did you perform that

function for?

A.The Illinois Central and the Norfolk and Southern.

Q.And did you also work at some point during your career at the Missouri Pacific here in St. Louis?

A.Yes, sir when I was first in practice.

Q.And can you tell me if you have a recommendation to Mr. Byrd whether he should return **[464]** to do and attempt to perform the work of a car man in the future?

A.I think he'd be very foolish to try that.

Q.And why is that?

A.Well, it's very heavy work and he doesn't have the normal back and he is never going to have a normal back and I think that if he were — he do expose himself to that sort of work activity he has a significant potential of reinjury and for that reason I don't think he's well-advised to go back to that sort of activity.

Q.Let me ask you this Doctor. If Mr. Byrd came to you and said for whatever reason he really needed to go back to work would you give him a release?

A.Yes, I'd explained to him that I think he's foolish to try to do that sort of work and that I'm not his policeman and he may have a release without restriction.

Q.Let me ask you this. Do you have an opinion to a reasonable degree of medical certainty whether Mr. Byrd is disabled in your

opinion from performing the job duties of a car man on a permanent basis?

A.I think he is.

* * *

[469]

1992?

A.That is correct.

Q.Now, the myelogram that you did about eighteen months later, roughly in November of 1994 showed that there were multiple epidural defects?

A.Right.

Q.But Mr. Byrd had not worked for the Railroad since April of 1992 thru the present time has he?

A.That is correct.

Q.And you mentioned I — I think in your direct testimony Doctor that a person can get a herniated disc in a variety of ways without any trauma or accident?

A.That is possible.

Q.Okay. Now, you're not saying to this jury that Mr. Byrd is totally disabled, are you?

A.No, sir.

Q.As a matter of fact the surgery did improve his condition, did it not?

A.Yes, sir.

Q.And when you had this functional testing performed in November of 1992, it showed that he was able to do light work?

A.Correct.

* * *

[480]

A.Yeah.

Q.— speak up a little bit louder?

A.Okay. All right. Kenneth Byrd.

Q.And how [sic] a man are you Ken?

A.Foryt [sic]-nine.

Q.When was your last birthday?

A.December — December 16th.

Q.And are you married man or single?

A.I'm married.

Q.To whom?

A.Ramona Byrd.

Q.How long have you and Ramona been married?

A.Since 1965. That's when we got married.

Q.All right. Do you have any children?

A.We had three girls.

Q.Are any of them married?

A.Two of them are.

Q.Are they living out of the house now?

A.Yes, they are.

Q.Are all three of them living out of the ;house now?

A.No, one girl, the youngest girl is back home. She's not in school right now; she's back

home.

* * *

[483]

A.Up until February the 5th of 1992.

Q.Have you worked at all as a car man since

then?

A.Yes, I've worked as a car man, I've worked as a lead car man, I worked as —

Q.No, since February 5th, 1992?

A.No, I haven't worked at all since February. Well, I went back in early return for one month and - in March of '92 until April I think, it was the 5th of '92.

Q.All right. After the thirty days was up you said you were there about a month?

A.Yes, I was on their, on light duty.

Q.All right. Can you tell the jury what you mean by light duty?

A.Well, they told me to go back to work and do what I could, to mainly show up everyday where they didn't have to count that against their lost time injury and they wanted me back out there where he could — didn't — where me being absent from work didn't count against their lost time injuries because they're graded on how much time people are gone from work and this and that so he wanted me back out there.

Q. All right. And why did you only last

* * *

[505]

"rip track".

Q. And who did you report to work to?

A. Well, we checked our — make our timecards out and then I reported to Lex Smith's office.

Q. And whose [sic] Lex Smith?

A. He was the general car forman [sic] over me at that time, there. Still is.

Q. And now Mr. Smith when you saw him did he give you instructions to perform any particular job on February 5th, 1992?

A. Yes, he handed us a piece of paper with a car number on it and said go to Columbus, Kansas/ I've sent Dick and Harry somewhere else or I mean I sent Dick and Jim, those were the two that working there,,. I sent Dick and Jim somewhere else to do a job; they don't have a reservoir so you take one out there and put one on this car.

Q. Did they assign anybody else to do this job with you?

A. Red Coble.

Q. And that's the same Red Coble that testified here yesterday?

A. Yes.

Q. Now, when Mr. Smith gave you this instruction, did he give give you an instructions as

* * *

[509]

you sat it on the ground and after Red kicked the old one off like he told us he did yesterday, what did you — what did you do then to replace that reservoir?

A. Well, we, me and Red together rolled it back under the car and got it up on top of the rail and pretty well in position and then we took, got down underneath it and started to trying to put it up. We picked the double end up and put it on the seal end there and got it in position. It was sitting in a real slope because it was a high sided gon (Phonetic) and that made it sat at a lot more — more severe angle and then when we started picking it up, that one end, when we picked up it; took and rolled that one ear off, rolling it off towards me. And once the one ear came off, the other ear came off too and just dropped right in my lap.

Q. Now what was your position? Were you under the gondola car with Red Coble?

A. Yes, I was sitting flat my rear underneath the car. We took — eased our legs back underneath the reservoir since it was on the rail, you know, about twelve, fourteen inches, rocked it up and got it up where we could get under it, to where we could start picking it up.

[510]

Q. And can you tell me when the reservoir began to fall and did fall, what did you do?

A. I just sat there and waited for it to hit me I guess, because there wasn't nothing you could do, it happened so quick.

Q. Now, did you feel any pain at that time?

A. Yes, the minute it hit, I — I hollered with — my back is hurt and we sat there for, I say, a few seconds and I said let's get the so and so off of me and put it up and we took — started to picking

it back up again and picked it back up and put it up and I rolled out from under the car and laid there on the ground on my back for a while and finally I got up and I told him, I said you're going to have to do it, I can't handle it.

Q. Why couldn't you handle the work from that point?

A. Well, the pain was so much right then I couldn't just handle it. He said well, you want me to call you an ambulance. I said naw, let me lay here for a while. I laid there on the ground for a while; the pain let up to a certain amount and I thought well, I'll be better in a little while so he went ahead and put the reservoir up which took maybe an hour or something like that doing plainly all the

* * *

[522]

Q. Would you like to?

A. Yes, I would like — I'd like to go back tomorrow if they'd let me, if I could go back with my back well and go back and do the car man's work.

Q. If you weren't injured?

A. Yes.

Q. Did you enjoy your job?

A. Yes, I enjoyed it very much. I had a great job; I enjoyed it.

Q. Can you tell me if there's been any other effect on you aside from physical as a result of this injury.

MR. HEMPSTEAD: Your Honor can we approach the bench?

(Counsel approached the bench and the following proceedings were had:)

MR. HEMPSTEAD: Just generally, I want to object to that question, it's too broad in scope. I don't know what he's talking about. I'm not talking about — I'm not sure if he's talking about emotional, if he's talking about — if he's still having the financial or what. It's — you want to enlighten me as to which way you're going to do this question.

MR. BAUER: He could obviously answer it

* * *

[530]

anything after you recover from the surgery? Hopefully, the next time you see Dr. Schoedinger, I think he said he's going to release you.

A. Well, he told me I can't go back as a car man. He said that there's no way I can do that kind of work. I'll do whatever I can. I mean I'm too active a person to go home and sit down and prop my feet up.

Q. All right. Let me ask you this. Do you have the farm listed with Mrs. Sartin who testified here earlier?

A. Yes, we listed it approximately a year and a half or two years ago. I can't take care of it and my son in-laws, they don't want to. One of them wants to but he has another farm that he manages for a guy; he ain't able to and the other one don't want to. My brothers help take care of a lot of it right now but it's — it's asking too much for somebody else to do your farming for you and you taking and do what you can.

Q. Let me — let me ask you this. The — the situation with the farm, are you physically able to handle it?

A. No, I can't do it.

Q. All right. Are you financially able to **[531]** make the payments on it?

A.No.

Q.If you don't sell it, what's going to happen to it?

A.If something don't happen and something don't change, I'm going to lose it.

Q.And do you know what the value of it is?

A.Two hundred to two hundred and twenty thousand.

Q.I think that's all the questions that Is all the questions that I have Judge.

THE COURT: All right. Ladies and gentlemen if you want to stand up and stretch for a moment you may do so.

Mr. Hempstead.

oOo

CROSS-EXAMINATION

QUESTIONS BY MR. HEMPSTEAD:

Q.There's a few things that weren't clear to me and I just want to make sure they're clear to the jury. Mr. Byrd you started on the disability benefits when, in 1992?

A.On disability?

Q.Yes.

A.Yes, I started on disability after I went

* * *

[628

position that he turned down. So look at Carlos' wages and look at Ken's wages and I've taken the taxes out and I want you to look at this and I have figured this out and I believe this is an honest appraisal of his loss wages to date. From '92, '93, '94 and the first

half of '95, I'm looking at Carlos' wages, his net wages after taxes; I'm deducting Ken's wages because he did earn some wages in 1992 when he — the year he was hurt. He lost, the net there, deduct that from Carlos' net; you get Ken's loss wages per year. That total to date is a hundred and seventeen, nine, seventy—eight. A hundred and eighteen thousand, ballpark. That's wages; that's what he's lossed to now. Now, I also prepared something because you heard the evidence, Ken is never gonna be able to go back to work as a car man. You heard a lot of evidence about — a lot of evidence about numbers and benefits and things of this nature and I think it is a fair representation of what will happen in the future and I think that this is going to be a little bit easier than you thought. Ken receives disability benefits now of sixteen hundred and five dollars a month which amounts to about nineteen thousand, two hundred dollars a year. His fringe benefit package that he **[629]** would have been entitled to had he continued there, you can look at the documents is nineteen thousand, four hundred and ninety-nine dollars a year. Those are very close to the same so if you drop those out what you're left then to figure out, the damages is ballpark. And I'm using Carlos Hildebrand's last year working forty-nine thousand, six, sixty-one last year he earned as a car man. You can see obviously the wages are going up. Take his net about forty thousand to four hundred and thirty-eight dollars; round that off to forty thousand dollars. Ken told you he was gonna work at least until age sixty-five for sixteen years and this is not giving him any raise; this is not taking into account the fact that these wages are going up considerably. And Carlos this year is ahead of where he was last year. He's headed to make more money this year. I think the present value would be six hundred and forty thousand dollars. Forty thousand dollars times sixteen years. That's not even — that's very, very conservative. That's not even giving him a cost of living increase. Then you heard him testify he has insurance premiums for less coverage than he had before that cost him four hundred and ninety dollars a month. Five thousand, eight hun-

dred and eighty dollars a year **[630]** times sixteen years is ninety-four thousand dollars and again that's not taking into account the premiums could go up and I — I think all of us know premiums go up just about every year. He pays a hundred dollars a month for prescriptions for his wife for depression. Who could blame her? Twelve hundred dollars a year, that's about nineteen thousand, two hundred dollars if you add the money that he's lost so far, this to now, plus what I think is very reasonable. I mean I could be telling you that his wages are going to continue to go up and — and in ten years he would be making seventy-five thousand dollars or something; I'm not doing that. Eight hundred, seventy-one thousand, two hundred and fifty-eight dollars. Eight hundred and seventy thousand, ballpark for the present value of his economic loss because of being unable to work as a car man. In addition, he's told you he's worked twenty-seven years for the Railroad. He's owned his farm for twenty years. He said if something doesn't happen soon he's gonna lose that farm. He's worked his entire life to get to this point and now it's all blown up in his face and it's going to go away. The farm he told you is worth two hundred and — two hundred and twenty thousand dollars. Is he entitled **[631]** to that compensation? Absolutely. In addition to that and this is — this is a measure of his loss of wage earning potential, his wage earning capacity as a car man. He could be out there. And you heard his seniority, he could be out there doing any job he wanted. And he was a worker. He'd be working alongside or instead of Carlos Hildebrand, making that money. Carlos is a worker too. He'd be doing a job with a lot of overtime but don't for a second think that Ken Byrd wouldn't. So, in addition, I'm going to suggest to you a figure for pain and suffering and disability and there's no doubt, you've seen Ken, you've seen him; there's no doubt that he is in pain constantly. He has severe disability as a result of this. I'm gonna ask you for past pain and suffering for 1992, twenty thousand dollars. Not a lot of money for that. 1993, twenty thousand dollars and 1994 twenty thousand dollars. That's sixty thousand

dollars. I'm going the ask you for fifty thousand dollars for 1995 and there's a reason for that. You heard Dr. Schoedinger describe the testing; the surgery that Ken underwent in '95. He went through hell. I think that's worth fifty thousand dollars. Into the future, one of the last things I did today, I read to you that he's going to **[632]** live about I think twenty-six point nine or twenty-seven years. He's gonna be in pain; I don't think you have to be a doctor, I'm sure you all know that the older he gets the more he's going to be disabled, the more pain he's going to have; his arthritis sets in. All of us get older, that happens, that's a fact of life. Ken would have been fine had he not been forced to take something like this out, there with Red Coble, with not a minute training and no proper tools and equipment. I'm going to ask you for that twenty-seven years for five hundred, forty thousand dollars. It's a lot of money up front but he's gonna be living through this twenty-five years from now. He's going to be suffering and going through this. That's a total of about six hundred and fifty thousand dollars for pain and suffering. And I want to tell you something. This is my suggestion, you're the jury, you're human beings, you can see and sense what Ken has gone through and is going through and suffering through. You put what you think is a fair value on that. That's my suggestion. You might think it's low, you might think it's high but when you consider all the evidence in this case there's not a doubt in the world that Ken Byrd deserves to be fully compensated

* * *

IN THE CIRCUIT COURT OF MISSOURI
CITY OF ST. LOUIS, DIVISION 6

THE HONORABLE MARY KATHRYN HOFF, JUDGE

NO.: 922-9869

KENNETH E. BYRD,
Respondent,

vs .

BURLINGTON NORTHERN RAILROAD
Defendant.

TRANSCRIPT OF RECORD

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INDEX

JULY 20, 1995

PAGE

TRIAL:

INSTRUCTION CONFERENCE 1

TRANSCRIPT APPROVED 12

REPORTER'S CERTIFICATE 13

[1]

TRIAL

The Trial began on Monday, July 17, 1995 before the Honorable Mary Kathryn Hoff, Judge of Division 6 of the 22nd Judicial Circuit of Missouri, City of St. Louis and a jury and two alternate jurors, which were impaneled, instructed, selected and sworn.

Mr. Joseph Bauer, Attorney at Law, appeared for the Plaintiff, Mr. Kenneth E. Byrd.

Mr. Mike Nepple, Attorney at Law, appeared as co-counsel for the Plaintiff.

Mr. Gerard F. Hempstead, Attorney at law, appeared for the Defendant, Burlington Northern Railroad Company.

Mr. Ed Radetic, Attorney at Law, appeared as co-counsel for the Defendant.

The following proceedings were had:

oOo

JULY 20, 1995

(The following is a partial transcript of the proceedings as requested by counsel.)

INSTRUCTION CONFERENCE

(The following proceedings were had in chambers, out of the presence and hearing of the jury.)

THE COURT: It's 2:45, the Court is in chambers with regard to the Instruction Conference in [2] this matter. The Court intends to give the following Instructions, all referring to MAI Civil unless otherwise noted.

Instruction Number One is 20 — 2.01 submitted by the Plaintiff. Instruction Number Two is 2.03 submitted by the

Plaintiff. Instruction Number Three is 3.01 submitted by the Plaintiff. Instruction Four is 2.02 submitted by the Plaintiff. Instruction Five is 2.04 submitted by the Plaintiff. Instruction Six is 11.02, the definition of negligence, submitted by the Plaintiff. Instruction Seven is the Verdict Director 24.01 submitted by the Plaintiff. Instruction Eight is 8.02 submitted by the Plaintiff. And Instruction Nine is 34.04, which is the assumption of risk withdrawal, submitted by the Plaintiff. And the the last is the verdict form which is 36.01 submitted by the Plaintiff. Mr. Bauer, do you have any objections to the Instructions?

MR. BAUER: No.

THE COURT: Now Mr. Radetic, what's your position?

MR. RADETIC: Your Honor, the Defendant objects to Instruction Number Six, the definition of negligence for reasons that will be further stated [3] later with regard to Plaintiff's — Defendant's offered Verdict Director A. We believe there's a requirement that the appropriate negligence definition Instruction would also require the definition of the term ordinary care and therefore we object to Instruction Number Six. Defendants object to Instruction Number Seven MAI 24.01. Defendants have submitted an Instruction in the alternative to this which is been labeled Instruction Number A. The difference between the two Instructions is the noticed requirements as set out in — set out in the *Quales vs. St. Louis and Southwestern Railway*. That case states that if notice is an issue in the case that the language as noted in *Quales* regarding the discovery, through ordinary care of conditions of work, if it could have been discovered, that though — that language should be added which I'll talk about more when we talk about Instruction A and for that reason we're objecting to Instruction Number Seven. Defendants object to Instruction Number Eight which is MAI Number 8.02 the damages Instruction in this case. This damage Instruction submits to the jury future pecuniary damages. This Instruction states in it's second last full sentence any award of future pecuniary

damages must be included at present [4] value. The evidence in this case closed without presentation of any evidence regarding a discount rate to be used to calculate present value. Further, in voir dire, Defendants inquired of the panel if any of the panel members were aware of how to compute an award of future pecuniary damages at present value; one panel member, Mrs. Chastain responded in the affirmative. Mrs. Chastain was strucked using a preemptory challenge by the Plaintiffs. As such the panel is incapable of determining the method; is incapable of determining present value of any future damages award both for lack of evidence in the case and because they are unaware of a — the methodology in the case. While the Defendants acknowledge that existing case law in Missouri has operated under the assumption that the jury and by inference the attorneys and everyone else in the Courtroom was aware of the methodology and means to reduce an award of future pecuniary damages to present value, there is no presumption in this case. Any presumption — and a — any presumption has been destroyed by the panel members answers to the questions in voir dire. It is Defendants position that absent this presumption, expert testimony is required to present present value information of any award. Further even [5] if expert testimony would be available as to the methodology for determining such an award, there is no evidence and there is been no offer of evidence refused or otherwise of a discount rate or any type of a interest rate by which this jury is to determine present value. For that reason we object to this Instruction. Plaintiffs — Defendants object to Instruction Number Nine which is the withdrawal of assumption of risk. The Defendants do not feel assumption of risk has been injected into this case. Plaintiffs have talked about the, excuse me, I said Plaintiff, Defendant have talked about the lack of a phone call; lack of communication. Once the two workers involved in the accident reached the place where the work was to be performed, it is Defendants contention that these two workers have at their hands the ability to perform the job or had the right to refuse to perform the job and to knowingly undertake a job which put their

bodily safety at risk and given the knowledge and experience and training that they had received over their collective fifty years of experience and over Byrd's, Mr. Byrd's twenty-five years of experience, was not an assumption of risk but it was the knowing; facing of a obvious risk and therefore we object to the withdrawal Instruction on [6] assumption of risk.

THE COURT: Do you have any objection to the verdict form?

MR. RADETIC: I have no objection to the verdict form.

THE COURT: All right with regard to your the Instructions that you tendered, do you want to go through them?

MR. RADETIC: Yes.

THE COURT: Instruction Number A.

MR. RADETIC: At this time the Defendants would offer Instruction A which is a Verdict Director based on Missouri approved Instruction 24.01 as modified by *Quales vs. St. Louis vs. Southwestern Railroad.* The relevant portion of this verdict instructor, Verdict Director is paragraph first first which reads "first, conditions for work were not reasonably safe and Defendant knew or by using ordinary care could have known of such condition and they — and that they were not reasonably safe." It is Defendant's contention that given the evidence in this case that every railroad car is different and that this — this work which — to be performed is a hundred miles away from where it was assigned. That Defendants are not charged with constructive [7] knowledge of every — of this railroad car because to do so would charge them with constructive knowledge of the undercarriage of every railroad car operating on the general rail system of the United States and for that reason we feel that notice is an issue in this case and that this Instruction should have been given in place of the Verdict Director that was given.

THE COURT: Instruction A is refused.

MR. RADETIC: Instruction B is a converse Instruction based on proffered Instruction A which basically states that the verdict must be for the Defendant unless you feel, unless you find that the Defendant failed to use ordinary care as submitted in Instruction Number A and that as a direct result of such failure, Plaintiff sustained damage. This is a converse Instruction based on MAI 33.15, paren. 3 and we offer this Instruction as a converse.

THE COURT: It's refused.

MR. RADETIC: I'm going to make three statements regarding three mitigating Instructions.

THE COURT: All right. I think we're on C.

MR. RADETIC: C, D and E. I'll cover with one statement. You don't want to do it that way? [8] These are three mitigation Instructions.

THE COURT: You're right, I got them. Go ahead.

MR. RADETIC: Instructions C, D and E are mitigation of damages Instructions. We feel that the evidence in this case demonstrates that Plaintiff has not exercised his responsibility under the law to mitigate his damages in this case. We feel that the Defendants are entitled to a specific Instruction regarding the Defendants failure to mitigate damages. Instruction C is in — in a form similar to MAI — MAI form and is based on *Hawkes vs. Norfolk and Western Railway* cite 876 S.W. 2d, 705, Mo. App. 1994. Instruction D, is another mitigation of damages Instructions based on the Plaintiff's failure to take reasonable steps in effecting the healing of his injury and his return to available employment. Instruction E is also a mitigation of damages Instructions based on failure to prevent aggravation of injury, to accomplish healing and minimize resulting damages from injury.

THE COURT: C, D and E will be refused. They are not in MAI and they do not meet the requirements for the Instructions.

MR. RADETIC: Defendants offer Instruction [9] Number F. this is a withdrawal Instruction based on MAI 34.02. The Instruction states the issue of Plaintiff's future wage loss and other future pecuniary damages is withdrawn from the case and you're not to consider such evidence in arriving at your verdict. This Instruction is offered based on the same reasons as the objection given to the damages Instruction, Instruction Number Eight and without — incorporating by reference here, the arguments I made with regard to that Instruction.

THE COURT: Instruction F is refused.

MR. RADETIC: Instruction G is withdrawal Instruction based on MAI 34.02 withdrawing from the jury's consideration the statement made by the — the Plaintiff that as a result of his injury the Plaintiff was going to lose his farm. We feel this this is an improper insertion into the case of financial hardship. Further, we feel the issue is designed solely for the purpose of invoking sympathy of the jury. It's — and extremely prejudicial to the Defendant and as such this issue should be withdrawn from the jury. Further, we feel that since the farm is presumed to be jointly owned by Mrs. Byrd and Mr. Byrd and Mrs. Byrd is not a party to this lawsuit that there is — this issue should be [10] withdrawn based on that ownership issue alone, particularly in light of the Court's refusal to admit Exhibit V which was the Plaintiff's 1991 income tax return which shows that the Plaintiff lost twenty-seven thousand dollars or more in the operation of his farm during that year. For that reason we offer Instruction G.

THE COURT: G is refused.

MR. RADETIC: Instruction H is the definitional Instruction MAI 11.07. Defining both the terms negligent and negligence or ordinary — and ordinary care. This Instruction is offered in conjunction with Instruction A offered by the Defen-

dant, the Verdict Director which contains both the terms negligence and ordinary care and under the Missouri rules both those terms must be defined if you use it in the Verdict Director.

THE COURT: That is refused. Anything further? Any comments?

MR. BAUER: No, I think they were properly refused.

THE COURT: Okay.

MR. NEPPLE: I think we need to make a record with respect to *Quales*. Off the record you had found that the Defendant knew or was — could **[11]** have known that he was charged with constructive knowledge of the weight of this reservoir and that they could have known about that and that record; that finding has to be on the record under *Quales*.

THE COURT: All right. The Court makes that finding and as a result is giving the Instruction as indicated.

END OF TRANSCRIPT

[12]

TRANSCRIPT OF RECORD APPROVED

This transcript of Record is hereby approved this 4th day of March, 1996/

/s/ Joseph L. Bauer
Attorney for Plaintiff

/s/ Gerard F. ;Hempstead
Attorney for Defendant

[13]

CERTIFICATE OF COURT REPORTER

I Bernadine Carson Dorsey, Official Court Reporter of the Circuit Court, City of St. Louis, State of Missouri, do hereby certify that I prepared the above and foregoing Transcript of Record and that it is a true and correct copy of the proceedings set forth therein.

/s/ Bernadine C. Dorsey
Bernadine C. Dorsey, C.C.R.
Official Court Reporter
22nd Judicial Circuit

I hereby acknowledge receipt of the Transcript of Record on this 8 day of November, 1995.

/s/ Gerard F. Hempstead
Attorney for Defendant

Transcript completed and
Attorney notified: November 7, 1995

Division: 06
Case: 92 2 9869

22 Judicial Circuit Court
Voir Dire Panel Information

Personal	Family	Court Experience			
MCINTYRE, ADA L	Married	Police/court relation	N	Crime victim	N
291858 / 00253	63109-0000	Ever been on crm jury	N	Ever been on civ jury	N
Salesperson	Blue collar	Witness in crm trial	N	Witness in civ trial	N
DEBASIO	UN ENGINEERING	Party to pending suit	N	Crm charges pending	N
Education: 13		Accident w/injury	N	Convicted felon	N
Age: 28	Children < 25:	Convict/misdemeanor	N		
MC NULTY, JEANETTE	Married	Police/court relation	N	Crime victim	N
340505 / 00479*	63107-0000	Ever been on crm jury	N	Ever been on civ jury	N
Unemployed	Unemployed	Witness in crm trial	N	Witness in civ trial	N
UNEMPLOYED	UNEMPLOYED	Party to pending suit	N	Crm charges pending	N
Education: 9	Children < 25: 3	Accident w/injury	N	Convicted felon	N
Age: 28		Convict/misdemeanor	N		
MAXWELL, ETHEL P	Single	Police/court relation	N	Crime victim	Y
340795 / 01192*	63107-0000	Ever been on crm jury	N	Ever been on civ jury	Y
Housekeeping		Witness in crm trial	N	Witness in civ trial	N
LT SISTER OF PO		Party to pending suit	N	Crm charges pending	N
Education: 9		Accident w/injury	N	Convicted felon	N
Age 44:	Children < 25: 3	Convict/misdemeanor	N		
GOSHEN, THOMAS D	Married	Police/court relation	N	Crime victim	N
346047 / 00677	63103-0000	Ever been on crm jury	Y	Ever been on civ jury	N
Administrator	Nurse	Witness in crm trial	N	Witness in civ trial	N
SELF EMPLOYED	BARNES HOSP	Party to pending suit	N	Crm charges pending	N
Education: 20		Accident w/injury	N	Convicted felon	N
Age: 67	Children < 25:	Convict/misdemeanor	N		
LOGAN, REGINALD	Single	Police/court relation	N	Crime victim	Y
033022 / 01176*	63115-0000	Ever been on crm jury	N	Ever been on civ jury	N
Construction Laborer		Witness in crm trial	N	Witness in civ trial	N
RASKAS DAIRY		Party to pending suit	N	Crm charges pending	N
Education: 12		Accident w/injury	N	Convicted felon	N
Age: 40	Children < 25: 4	Convict/misdemeanor	N		
DE COURSEY, CAROL L	Married	Police/court relation	N	Crime victim	N
356170 / 00021*	63110-0000	Ever been on crm jury	N	Ever been on civ jury	N
White Collar	Insurance Agent/Salesperson	Witness in crm trial	N	Witness in civ trial	N
WASH UNIV MED	WESTERN SOUTHER	Party to pending suit	N	Crm charges pending	N
Education: 13		Accident w/injury	N	Convicted felon	N
Age: 39	Children < 25: 1	Convict/misdemeanor	N		

** = juror number of person selected to serve on this jury*

Division: 06
Case: 92 2 9869

22 Judicial Circuit Court
Voir Dire Panel Information

Personal	Family	Court Experience			
CHASTAIN, SHERRY R	Single	Police/court relation	N	Crime victim	Y
009085 / 00297*	63130-0000	Ever been on crm jury	Y	Ever been on civ jury	N
White collar		Witness in crm trial	N	Witness in civ trial	Y
DEAN WITTER		Party to pending suit	N	Crm charges pending	N
Education: 16		Accident w/injury	N	Convicted felon	N
Age: 51	Children < 25:	Convict/misdemeanor	N		
WILSON, LAVORNE	Married	Police/court relation	N	Crime victim	N
356363 / 00643*	63147-0000	Ever been on crm jury	N	Ever been on civ jury	Y
Secretary/Receptionist	Blue collar	Witness in crm trial	N	Witness in civ trial	N
MAGDALA FOUNDAT	CITY OF ST LOUI	Party to pending suit	N	Crm charges pending	N
Education: 12		Accident w/injury	N	Convicted felon	N
Age: 41	Children < 25: 2	Convict/misdemeanor	N		
MC CLANAHAN, JUDITY A	Divorced	Police/court relation	N	Crime victim	Y
356415 / 00222*	63111-2414	Ever been on crm jury	N	Ever been on civ jury	N
Driver		Witness in crm trial	N	Witness in civ trial	N
BI STATE		Party to pending suit	N	Crm charges pending	N
Education: 13		Accident w/injury	N	Convicted felon	N
Age: 52	Children < 25: 2	Convict/misdemeanor	N		
HAMPTON, VALERIA A	Divorced	Police/court relation	N	Crime victim	Y
356465 / 00417*	63116-0000	Ever been on crm jury	Y	Ever been on civ jury	N
ROOSEVELT BANK		Witness in crm trial	N	Witness in civ trial	N
White collar		Party to pending suit	N	Crm charges pending	N
Education: 14		Accident w/injury	N	Convicted felon	N
Age: 56	Children < 25:	Convict/misdemeanor	N		
SCHAEFER, JACQUELYN S	Divorced	Police/court relation	N	Crime victim	N
356606 / 00074*	63109-0000	Ever been on crm jury	N	Ever been on civ jury	Y
Clerk		Witness in crm trial	N	Witness in civ trial	N
SW BELL		Party to pending suit	N	Crm charges pending	N
Education: 12		Accident w/injury	N	Convicted felon	N
Age: 50	Children < 25: 2	Convict/misdemeanor	N		
HOGAN, CAMILLA	Single	Police/court relation	N	Crime victim	N
356763 / 00138*	63113-0000	Ever been on crm jury	N	Ever been on civ jury	N
Unemployed		Witness in crm trial	N	Witness in civ trial	N
UNEMPLOYED		Party to pending suit	N	Crm charges pending	N
Education: 10		Accident w/injury	N	Convicted felon	Y
Age: 51	Children < 25:	Convict/misdemeanor	Y		

** = juror number of person selected to serve on this jury*

Division: 06
Case: 92 2 9869

22 Judicial Circuit Court
Voir Dire Panel Information

Personal	Family	Court Experience			
OLIVER, DEBORAH	Sincle	Police/court relation	N	Crime victim	N
356868 / 00107*	63107-0000	Ever been on crm jury	N	Ever been on civ jury	N
Unemployed		Witness in crm trial	N	Witness in civ trial	N
UNEMPLOYED		Party to pending suit	N	Crm charges pending	N
Educatoin: 12		Accident w/injury	N	Convicted felon	N
Age: 28	Children < 25: 3	Convict/misdemeanor	N		
SKAGGS, ALAN W	Married	Police/court relation	N	Crime victim	N
356872 / 01238	63116-1519	Ever been on crm jury	N	Ever been on civ jury	N
Unemployed	Homemaker	Witness in crm trial	N	Witness in civ trial	N
UNEMPLOYED	HOUSEWIFE	Party to pending suit	N	Crm charges pending	N
Education: 12		Accident w/injury	N	Convicted felon	N
Age: 36	Children < 25: 2	Convict/misdemeanor	N		
SILVER, ZENOBIA L	Married	Police/court relation	N	Crime victim	Y
357050 / 00331	62108-0000	Ever been on crm jury	Y	Ever been on civ jury	Y
Flight Attendant	Self-employed	Witness in crm trial	N	Witness in civ trial	N
TWA	DISABLED	Party to pending suit	N	Crm charges pending	N
Education: 16		Accident w/injury	N	Convicted felon	N
Age: 38	Children < 25:	Convict/misdemeanor	N		
MC LEAN, SHAWNA L	Single	Police/court relation	Y	Crime victim	Y
357931 / 01130	63104-0000	Ever been on crm jury	N	Ever been on civ jury	N
White collar		Witness in crm trial	N	Witness in civ trial	N
BAMSL		Party to pending suit	N	Crm charges pending	N
Education: 16		Accident w/injury	N	Convicted felon	N
Age: 29	Children < 25:	Convict/misdemeanor	N		
ALLEN, GEORGIA MAE	Married	Police/court relation	N	Crime victim	N
15447 / 00238*	63108-0000	Ever been on crm jury	N	Ever been on civ jury	N
Blue collar	Retired	Witness in crm trial	N	Witness in civ trial	N
MRS BEN LOEB	RETIRED	Party to pending suit	N	Crm charges pending	N
Education: 12		Accident w/injury	N	Convicted felon	N
Age: 49	Children < 25:	Convict/misdemeanor	N		
FREEMAN, ALBERT L		Police/court relation		Crime victim	
246138 / 00163	63115-0000	Ever been on crm jury		Ever been on civ jury	
		Witness in crm trial		Witness in civ trial	
		Party to pending suit		Crm charges pending	
Education:		Accident w/injury		Convicted felon	
Age: 56	Children < 25:	Convict/misdemeanor			

** = juror number of person selected to serve on this jury*

Division: 06 **22 Judicial Circuit Court**
Case: 92 2 9869 **Voir Dire Panel Information**

Personal	Family	Court Experience			
TEDDER, TERENCE D	Single	Police/court relation	N	Crime victim	Y
240195 / 01159	63123-0000	Ever been on crm jury	N	Ever been on civ jury	N
Firefighter		Witness in crm trial	Y	Witness in civ trial	N
ST L CITY		Party to pending suit	N	Crm charges pending	N
Education: 12		Accident w/injury	N	Convicted felon	N
Age: 33	Children < 25:	Convict/misdemeanor	Y		
MAYBERRY-WHITE, FRANCES J	Single	Police/court relation	Y	Crime victim	Y
357987 / 01179	63107-0000	Ever been on crm jury	N	Ever been on civ jury	Y
Blue collar		Witness in crm trial	N	Witness in civ trial	Y
MALLINCKRODT		Party to pending suit	N	Crm charges pending	N
Education? 13		Accident w/injury	N	Convicted felon	N
Age: 47	Children < 25:	Convict/misdemeanor	N		
SMITH, THOMAS L	Married	Police/court relation	N	Crime victim	Y
051125 / 00954*	63139-0000	Ever been on crm jury	Y	Ever been on civ jury	Y
Blue collar	Firefighter	Witness in crm trial	N	Witness in civ trial	N
PACER INDUSTRIES	ST MARYS	Party to pending suit	N	Crm charges pending	N
Education: 14		Accident w/injury	N	Convicted felon	N
Age: 43	Children < 25: 3	Convict/misdemeanor	N		
WEST, PHYLLIS L	Divorced	Police/court relation	N	Crime victim	Y
358026 / 01065	63116-0000	Ever been on crm jury	N	Ever been on civ jury	N
Nurse		Witness in crm trial	N	Witness in civ trial	N
VETERANS AFFAIR		Party to pending suit	N	Crm charges pending	N
Education: 13		Accident w/injury	N	Convicted felon	N
Age: 48	Children < 25:	Convict/misdemeanor	N		
DENNESS, ROSELLE A	Single	Police/court relation	N	Crime victim	Y
263283 / 01155	63139-0000	Ever been on crm jury	N	Ever been on civ jury	N
Self-employed		Witness in crm trial	N	Witness in civ trial	N
ARTIST		Party to pending suit	Y	Crm charges pending	N
Eduction: 18		Accident w/injury	N	Convicted felon	N
Age: 49	Children < 25	Convict/misdemeanor	N		
KOZLOWSKI, DENNIS J	Married	Police/court relation	N	Crime victim	Y
030751 / 01250	63115-0000	Ever been on crm jury	Y	Ever been on civ jury	Y
Laborer	Waiter/Waitress	Witness in crm trial	N	Witness in civ trial	N
FOREST PARK COL	RITZ CARLTON	Party to pending suit	N	Crm charges pending	N
Education: 16		Accident w/injury	N	Convicted felon	N
Age: 35	Children < 25:	Convict/misdemeanor	N		

** = juror number of person selected to serve on this jury*

Division: 06
Case: 92 2 9869

22 Judicial Circuit Court
Voir Dire Panel Information

Personal	Family	Court Experience			
BRUEMMER, PATRICIA D	Widowed	Police/court relation	N	Crime victim	Y
068524 / 01062	63109-0000	Ever been on crm jury	N	Ever been on civ jury	Y
Retired		Witness in crm trial	N	Witness in civ trial	N
RETIRED		Party to pending suit	N	Crm charges pending	N
Education: 12		Accident w/injury	N	Convicted felon	N
Age: 65	Children < 25:	Convict/misdemeanor	N		
LEIP, JENNIFER M	Single	Police/court relation	N	Crime victim	N
358223 / 01114	63109-0000	Ever been on crm jury	N	Ever been on civ jury	N
Waiter/Waitress		Witness in crm trial	N	Witness in civ trial	N
ZIAS		Party to pending suit	N	Crm charges pending	N
Education: 15		Accident w/injury	N	Convicted felon	N
Age: 22	Children < 25:	Convict/misdemeanor	N		
STELL, THEDA K	Divorced	Police/court relation	Y	Crime victim	Y
358226 / 01264	63111-0000	Ever been on crm jury	N	Ever been on civ jury	N
Retired		Witness in crm trial	N	Witness in civ trial	N
RETIRED		Party to pending suit	N	Crm charges pending	N
Education: 10		Accident w/injury	N	Convicted felon	N
Age: 69	Children < 25:	Convict/misdemeanor	N		
PANKE, ELIZABETH L	Married	Police/court relation	N	Crime victim	Y
041297 / 01020	63108-0000	Ever been on crm jury	N	Ever been on civ jury	Y
Architect	Salesperson	Witness in crm trial	N	Witness in civ trial	N
SELF EMPLOYED	VSP INC	Party to pending suit	N	Crm charges pending	N
Education: 20		Accident w/injury	N	Convicted felon	N
Age: 38	Children < 25: 2	Convict/misdemeanor	Y		
MC CLENAHAN, NELSON R	Divorced	Police/court relation	N	Crime victim	Y
358277 / 01188	63116-0000	Ever been on crm jury	Y	Ever been on civ jury	Y
Engineer		Witness in crm trial	N	Witness in civ trial	Y
SVERDRUP		Party to pending suit	N	Crm charges pending	N
Education: 14		Accident w/injury	N	Convicted felon	N
Age: 54	Children < 25: 1	Convict/misdemeanor	N		
WALKER, GARY LEE	Single	Police/court relation	N	Crime victim	N
358321 / 01181	63112-0000	Ever been on crm jury	N	Ever been on civ jury	N
Unemployed		Witness in crm trial	N	Witness in civ trial	N
UNEMPLOYED		Party to pending suit	N	Crm charges pending	N
Education: 13		Accident w/injury	N	Convicted felon	N
Age: 32	Children < 25: 3	Convict/misdemeanor	N		

** = juror number of person selected to serve on this jury*

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No.: 922-9869

Division No.:

KENNETH E. BYRD,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a corporation,
Defendant.

DEFENDANT'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF ALL EVIDENCE

COMES NOW Defendant, Burlington Northern Railroad Company and for its Motion for directed verdict states as follows:

1. Plaintiff, Kenneth Byrd, has brought this action pursuant to the FELA, 44 U.S.C. §51.

2. It is incumbent upon the Plaintiff to prove that the Railroad negligently caused his injury or condition.

3. In order to prove negligence, plaintiff must show that the Burlington Northern breached a duty of care, that breach was both a cause in fact and legal cause of his injuries, and that as a result of that breach, plaintiff suffered damages. Further, plaintiff must demonstrate that the Burlington Northern could have reasonably foreseen that a particular condition or circumstance could cause the injury. This duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances.

4. Each of the above elements of negligence must be provided by competent evidence.

5. Plaintiff in this action has failed to prove by competent evidence the following:

a. That the Burlington Northern knew that the conditions complained of could have caused the accident that allegedly resulted the plaintiff's injury;

b. That the Burlington Northern could have reasonably foreseen that the conditions complained of could have caused the accident complained of;

c. That the Railroad breached any duty of care owed to the plaintiff;

d. That any alleged breach was in fact the cause of plaintiff's injury;

e. That any alleged breach was the legal or proximate cause of plaintiff's injuries;

f. Whether the particular circumstances or injury was foreseeable and therefore should have been reasonably.

6. Plaintiff has failed to prove by competent evident the damages caused in whole or part by alleged negligence of Defendant Burlington Northern Railroad.

7. Plaintiff has failed to prove by competent evidence any damages of future pecuniary losses reduced to present value as required under the relevant case law governing F.E.L.A. actions.

WHEREFORE, Defendant, Burlington Northern Railroad Company, prays that this Court direct a verdict in its favor in this matter, or in the alternative direct a verdict on the issue of future pecuniary losses, tax costs incurred in this matter to the Plaintiff,

Kenneth Byrd, and for such other and further relief as this Court deems just

Respectfully submitted,

BRASHER LAW FIRM

/s/ Edward P. Radetic
Gerard F. Hempstead, MBE #20659
Edward P. Radetic, MBE #44663
William A. Brasher, MBE #30155
One Metropolitan Square
211 North Broadway, Suite 2300
Saint Louis, Missouri 63102
(314) 621-7700
Attorneys for Defendant
Burlington Northern
Railroad Company

DENIED:
/s/ Mary K. Hoff 27345
7/20/95

\CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Defendant's Motion For Directed Verdict At The Close Of All Evidence was hand-delivered on this 20th day of July, 1995 to:

Joseph L. Bauer, Esq.
BAUER & BAEBLER
900 Walnut, Suite 520
St. Louis, MO 63102
(314) 241-7700
FAX (314) 241-0003

Attorney for Plaintiff

future pecuniary losses, tax costs incurred in this matter to the Plaintiff, Kenneth Byrd, and for such other and further relief as this Court deems just

Respectfully submitted,
BRASHER LAW FIRM

/s/ Edward P. Radetic
Gerard F. Hempstead, MBE #20659
Edward P. Radetic, MBE #44663
William A. Brasher, MBE #30155
One Metropolitan Square
211 North Broadway, Suite 2300
Saint Louis, Missouri 63102
(314) 621-7700
Attorneys for Defendant
Burlington Northern
Railroad Company

DENIED:
/s/ Mary K. Hoff 27345
7/20/95

\CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Defendant's Motion For Directed Verdict At The Close Of All Evidence was hand-delivered on this 20th day of July, 1995 to:

Joseph L. Bauer, Esq.
BAUER & BAEBLER
900 Walnut, Suite 520
St. Louis, MO 63102
(314) 241-7700
FAX (314) 241-0003

Attorney for Plaintiff

INSTRUCTION NO. 8

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the occurrence mentioned in the evidence. Any award of future pecuniary damages must be included at present value. Any award you make is not subject to income tax.

INSTRUCTION NO. F

The issue of plaintiff's future wage loss and other future pecuniary damages is withdrawn from the case and you are not to consider such evidence in arriving at your verdict.

/s/ Mary K. Hoff 7/20/95

Submitted by: Defendant

M.A.I. 34.02 (as modified)

VERDICT _____

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff, Kenneth Byrd, for personal injuries against defendant, Burlington Northern Railroad Company, we, the undersigned jurors, find in favor of:

Plaintiff Kenneth Byrd

Plaintiff Kenneth Byrd or Defendant Burlington Northern Railroad Company

Note: Complete the following paragraph only if the above finding is in favor of plaintiff, Kenneth Byrd.

We, the undersigned jurors, assess the damages of plaintiff Kenneth Byrd at $1,300,000.00 (stating the amount).

Note: All jurors who agree to the above findings must sign below.

/s/ Carol. L. DeCoursey	/s/ Jacquelyn S. Schaefer
/s/ Valeria Hampton	/s/ Judith A. McClanahan
/s/ Reginald Logan	/s/ Jeanete McNulty
/s/ Camilla Hogans	/s/ Ethel Maxwell
/s/ Deborah Oliver	/s/ Georgia Allen
/s/ LaVerne Wilson	/s/ Thomas L. Smith

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No.: 922-09869

Division No.: 6

KENNETH E. BYRD,
Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a corporation,
Defendant.

ORDER

This Court received a timely Motion for New Trial or in the alternative, Motion for Judgment Notwithstanding the Verdict in the above matter. On October 27, 1995, the Court received a Motion to Correct the Record and a Motion to Reduce the Judgment. On November 3, 1995, the Court heard arguments of counsel on all Motions and took the Motions under submission. After further consideration, the Court denies all of Defendant's Motions in all respects.

So ORDERED:

Dated: November 14, 1995

/s/ Mary K. Hoff
Mary K. Hoff, Judge #27345

cc: Mr. Joseph Bauer, Esquire
Mr. Gerard Hempstead, Esquire

Form 8

MIS[illegible]OURI CIRCUIT COU[illegible]
TWENTY-SECOND JUDICIAL DISTRICT
(ST. LOUIS CITY)
STATE OF MISSOURI

RECEIVED
[illegible] OFFICE
[illegible] CK

NOTICE OF APPEAL
TO MISSOURI COURT OF APPEALS
EASTERN DISTRICT

[illegible] 22 PM 4:27
CASHER

NO. 922-09869

RECEIVED
CIRCUIT [illegible]

KENNETH E. BYRD,
PLAINTIFF

VS

BURLINGTON NORTHERN
RAILROAD COMPANY
DEFENDANT

CITY OF ST. LOUIS

Mary K. Hoff
JUDGE

22nd
CIRCUIT NO.

6
DIVISION NO.

APPELLATE NO.

Notice is hereby given that Burlington Northern Railroad Company appeals to the Missouri Court of Appeals, Eastern District

November 22, 1995
DATE NOTICE OF APPEAL FILED (TO BE FILLED IN BY CLERK'S OFFICE)

Kara M. Turner 45587
SIGNATURE OF ATTORNEY OR APPELLANT

CIVIL CASE INFORMATION

TYPED NAME OF APPELLANT'S ATTORNEY

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BURLINGTON NORTHERN RAILROAD COMPANY
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CITY STATE ZIP CODE

DATE OF JUDGMENT
July 20, 1995

☐ COURT NUMBER OF DAYS
☒ JURY OF TRIAL

BRIEF DESCRIPTION of CASE:

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DATE/AFTER TRIAL MOTION FILED
August 17, 1995
DATE/AFTER TRIAL MOTION DECIDED
November 14, 1995
JUDGMENT or ORDER APPEALED FROM:
(Attach a copy of Judgment)

001

DIRECTION TO CLERK

The clerk is requried to mail a copy of the notice of appeal by certified mail to the attorneys of record of all parties other than those taking the appeal, and to mail a copy of the notice of appeal together with the docket fee to the clerk of the appellate court. If a party does not have an attorney, the notice must be mailed to the party at his last known address. The clerk should then fill in the memorandum on the reverse side hereof. (See Rules 81.08 and 30.01 (h) and (i).

BEST AVAILABLE COPY

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. 69550

KENNETH E. BYRD, Plaintiff-Respondent

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the Circuit Court of the City of St. Louis
Hon. Mary K. Hoff
Circuit Case No. 922-09869

MOTION FOR REHEARING OR, IN THE ALTERNATIVE, MOTION TO TRANSFER TO THE SUPREME COURT

COMES NOW Defendant-Appellant, Burlington Northern Railroad Company ("Burlington"), pursuant to Rule 84.17 and 83.02, and moves this Court for a rehearing in this case, or in the alternative, moves this Court to order that this case be transferred to the Missouri Supreme Court because of the general interest and importance of the questions involved in this case and for purposes of reexamining and interpreting existing law. Pursuant to Local Rule 407, Burlington sets forth the following information about the opinion which Burlington is asking the Court to rehear or transfer.

Date:	December 10, 1996
Author:	Judge Gerald M. Smith
Concurred:	Crane, P.J. and Pudlowski, J.

In Support of its Motion Burlington states:

1. This case should be reheard because this Court misinterpreted the law in holding that the trial court did not commit reversible error by giving Plaintiff-Respondent Kenneth Byrd's ("Byrd") instruction pertaining to future pecuniary damages and by refusing to give Burlington's withdrawal instruction of those damages. This Court erroneously assumed that each juror in his or her respective fashion determined present value of future wage loss when it was clear from the jury voir dire that no member of the jury knew how to calculate present value. The Missouri Supreme Court has held that it is proper to assume that the jury determined present value only when there is an absence of a contrary indication otherwise. *Anglim v. Missouri Railroad,* 832 S.W.2d 298 (Mo. 1992). In this case, the voir dire of the jury revealed that no juror knew how to calculate present value and no evidence was presented to instruct the jury as to any method to determine present value. Therefore, the jury could not possibly have determined the present value of Byrd's future wage loss.

2. This case should be reheard because this Court misinterpreted the law when it held that the trial court did not commit reversible error by giving Byrd's instruction pertaining to future pecuniary damages and by refusing to give Burlington's withdrawal instruction of those damages, because this Court erroneously shifted the burden to produce evidence of how to calculate present value to the defendant. It is an essential element of the plaintiff's case to reduce damages to present value. *DiSabatino v. National Railroad Passenger Corp,* 724 F.2d 394, 396 (3rd Cir. 1984); *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540, 544 (3rd Cir.), *cert denied,* 409 U.S. 879 (1972).

3. This case should be reheard or transferred because this Court misinterpreted the law in holding that the trial court properly refused to give Burlington's mitigation of damage instruction because the evidence supported plaintiff's failure to mitigate his damages. At the very least, a factual issue arose

regarding the plaintiff's failure to mitigate damages and under Missouri law the issue should have been submitted to the jury. *Edgewater Health Care. Inc. v. Health Systems Management, Inc.*, 752 S.W.2d 860, 868 (Mo.App. 1988). By producing evidence of Byrd's failure to accept a position which was offered to him by Burlington, evidence that Byrd was qualified for the position, evidence that Byrd was able to work, and evidence of Byrd's failure to look for other work, Burlington sufficiently raised the issue of mitigation and a question of fact should have been submitted to the jury. *Kauzlarich v. The Atchison, Topeka, & Santa Fe Railway Co.*, 910 S.W.2d 254, 258 (Mo.banc 1995).

4. This case should be reheard because this Court overlooked or misinterpreted a material fact which was that Burlington was not the owner of the car which Byrd was assigned to repair, and, therefore, Burlington should not have been charged with constructive knowledge that the car was full and the boom could not be used to replace the reservoir.

5. Therefore, this Court should have reversed the trial court decision which refused to give Burlington's proffered *Oualls* instruction which would have submitted the issue of whether Burlington knew or should have known of the alleged dangerous condition.

6. This Court should also rehear this case because it misinterpreted the law of Missouri when it held that Burlington should be charged with knowledge of an unsafe condition when the Court itself found that there was only a fifty-fifty chance that one of the factors of the unsafe condition existed. There is no support in Missouri law for charging a defendant with of a condition which could have existed. Rather, under Missouri law, when there is a dispute in evidence then a jury issue is created. *Oualls v. St. Louis Southwestern Railway Co.*, 799 S.W.2d 84 (Mo.banc 1990). *Riley v. Union Pacific Railroad*, 904 S.W.2d 437 (Mo.App. 1995).

7. In the alternative, this case should also be transferred to the Missouri Supreme Court because it requires a reexamination of *Anglim v. Missouri Pacific Railroad*, 832 S.W.2d 298 (Mo.banc 1992). More specifically this case raises the issue of what constitutes a "contrary indication" that the jury did not determine present value of future wage loss.

8. This case should be also be transferred to the Missouri Supreme Court because the following issues raised in this case are of such general interest and importance:

a) Whose burden is it in a FELA case to produce evidence of how to calculate present value of future wage loss when there is evidence that the jury does not know how to calculate present value? Neither the Missouri Supreme Court nor any Missouri appellate court, other than this Court, has addressed this issue. However, there is support under Missouri law for the proposition that it is the plaintiff's burden to produce evidence to support his instruction. **M.A.I. 3.01**

b) Whether the trial court has the authority to take the mitigation of damage issue away from the jury when the defendant has offered evidence that it offered the plaintiff a job which the plaintiff was qualified for, and the plaintiff only offers his own reasons for not accepting that job? Under existing Missouri law, when reviewing whether an instruction should have been given to the jury, "a court must view the evidence in a light most favorable to the submission of that instruction." *Kauzlarich v. Atchison, Topeka; and Santa Fe Railway Co.*, 910 S.W.2d 254, 258 (Mo. banc 1995), *Hawkes v. Norfolk & Western Railway Co.*, 876 S.W.2d 705, 707 (Mo.App. 1994), *Edgewater Health Care v. Health Systems*, 752 S.W.2d 860 (Mo.App. 1988). In this case, there was at the very least a dispute as to the evidence, and the instruction should have been given.

c) Whether it is proper to charge a defendant with constructive knowledge of an unsafe condition when there is only a fifty-fifty chance that the unsafe condition existed? There is no support in Missouri law for charging a defendant with of a condition which could have existed. Rather, under Missouri law, when there is a dispute in evidence then a jury issue is created. *Oualls v. St. Louis Southwestern Railway Co.*, 799 S.W.2d 84 (Mo.banc 1990). *Riley v. Union Pacific Railroad*, 904 S.W.2d 437 (Mo.App. 1995).

d) If this court denies Burlington's request for rehearing, then the Supreme Court will need to address whether it is proper to charge a defendant railroad with knowledge of the contents of a car which the defendant railroad does not own?

9. Burlington submits it suggestions in support along with this Motion and incorporates it by reference as if fully set forth herein.

WHEREFORE, Defendant/Appellant, Burlington Northern Railroad Company, respectfully requests that this Court rehear and reconsider the opinion herein and reverse the judgment granted herein, and remand this case for a new trial. In the alternative, Defendant/Appellant, Burlington Northern Railroad Company, moves this Court for an order transferring this appeal to the Missouri Supreme Court pursuant to Rule 83.02 on the grounds that this appeal is of general interest and importance and requires a reexamination or interpretation of existing law.

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. 69550

KENNETH E. BYRD, Plaintiff-Respondent

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the Circuit Court of the City of St. Louis
Hon. Mary K. Hoff
Circuit Case No. 922-09869

BURLINGTON'S SUGGESTIONS IN SUPPORT OF ITS MOTION FOR REHEARING OR, IN THE ALTERNATIVE, MOTION TO TRANSFER TO THE SUPREME COURT

I. THIS COURT SHOULD REHEAR THIS CASE, OR, IN THE ALTERNATIVE TRANSFER IT TO THE MISSOURI SUPREME COURT BECAUSE IT EITHER MISINTERPRETED EXISTING LAW OR THE LAW NEEDS TO BE REEXAMINED AND BECAUSE OF THE GENERAL INTEREST AND IMPORTANCE IN THE ISSUES RAISED BY THIS CASE.

This case requires some clarification from the Supreme Court about what constitutes a "contrary indication" that the jury did not determine the present value of future wage loss. *Anglim v. Missouri Pacific Railroad*, 832 S.W.2d 298 (Mo.banc 1992). In *Anglim*, the Supreme Court held:

> *In the absence of any contrary indication*, [the Court] can assume each juror in his or her respective fashion complied

> with the instruction, and determined the present value of future wage loss.

In this case, Burlington asked the jury panel during voir dire the following question:

> Is there anyone here who knows how to determine how much money would have to be invested today so that Ken Byrd would not lose any net wages for the rest of his working life? Is there anyone who knows how to do so?

(Tr. 89). The one juror who responded in the affirmative was eventually struck by Byrd, and, therefore, Burlington again asked the jury panel the following question:

> Does anyone other than Ms. Chastain know how to reduce the future pecuniary damage at present value? Does anyone else know how to do this?

(Tr. 113). There is no dispute that Byrd offered the jury no evidence, either lay or expert, to assist the jury in determining the present value of the Byrd's future wage loss. It was impossible for each juror to determine present value even in his or her respective fashion because no juror knew how to determine present value. This issue needs to be readdressed by this Court or the Supreme Court.

Secondly, this court on appeal held:

> If defendant wishes to influence that determination it is free to present evidence to assist the jury. If it chooses not to, then it leaves that determination to the common knowledge of the jury.

This holding effectively places the burden to produce evidence of how to calculate present value on the defendant when under Missouri law it is the plaintiff's duty to prove his damages and produce evidence to support his proffered instruction. M.A.I. 3.01. The Missouri Supreme Court has not addressed this issue

previously, and if this Court does not wish to rehear argument on this issue, then the Missouri Supreme Court should address this issue because of its general importance in FELA cases.

Third, this cases raises the issue of whether a court may accept the plaintiff's proffered justification for failing to accept a job offered by he defendant and, based on plaintiff's explanation, refuse to submit the mitigation of damage issue to the jury. Under Missouri law, when reviewing whether an instruction should have been given to the jury, "a court must view the evidence in a light most favorable to the submission of that instruction 88 *Kauzlarich v. Atchison, Topeka, and Santa Fe Railway Co.*, 910 S.W.2d 254, 258 (Mo. banc 1995), *Hawkes v. Norfolk & Western Railway* Co., 876 S.W.2d 705, 707 (Mo.App. 1994), *Edgewater Health Care v. Health Systems*, 752 S.W.2d 860 (Mo.App. 1988). In this case, the appellate court violated this standard by accepting Byrd's proffered explanation for his refusal to take the job offered by Burlington. Therefore, this issue should be re-heard by this Court, or transferred to the Missouri Supreme Court.

Finally, this case raises the issue of whether it is proper to charge a defendant with constructive knowledge of an unsafe condition when there is only a fifty-fifty chance that the unsafe condition existed. This Court cited to no cases, and Burlington has been unable to find any cases in which the defendant was charged with constructive knowledge of an unsafe condition when there was only a fifty-fifty chance that the unsafe condition existed. By definition, a fifty-fifty chance that a condition exists, should have at least created a jury issue of whether Burlington knew that the condition existed. Under Missouri law, when there is a dispute in evidence then a jury issue is created. *Qualls v. St. Louis Southwestern Railway Co.*, 799 S.W.2d 84 (Mo.banc 1990). *Riley v. Union Pacific Railroad*, 904 S.W.2d 437 (Mo.App. 1995). This issue should have been submitted to the jury.

II. THIS COURT SHOULD GRANT A REHEARING BECAUSE IT OVERLOOKED OR MISINTERPRETED A MATERIAL FACT WHICH WAS THAT BURLINGTON WAS NOT THE OWNER OF THE CAR WHICH BYRD WAS ASSIGNED TO REPAIR, AND, THEREFORE, BURLINGTON SHOULD NOT HAVE BEEN CHARGED WITH CONSTRUCTIVE KNOWLEDGE THAT THE CAR WAS FULL AND THE BOOM COULD NOT BE USED TO REPLACE THE RESERVOIR.

Under Missouri law, the defendant's knowledge of the alleged unsafe condition is an essential element of the plaintiff's case that must be submitted to the jury if "there [is] an issue of fact as to the defendant's actual or constructive knowledge of the condition." *Oualls v. St. Louis Southwestern Railway Co.*, 799 S.W.2d 84 (Mo.banc 1990). In *Oualls*, three factors made up the alleged unsafe condition. First, the bridge in question had an open deck design. Second, there were no handrails or walkways. And, third, the bridge was slippery because of snow and ice on the bridge. The Court found that there was an issue of whether the defendant had knowledge about the extent of the accumulation of ice and snow and about whether the bridge was slippery. *Oualls*, 799 S.W.2d at 87. Since there was a jury issue regarding one of the factors which made up the alleged unsafe condition, the Court should have submitted the defendant's knowledge of the unsafe condition to the jury. *Id.*

In this case, as in *Oualls*, there are numerous factors which made up the alleged dangerous condition: a) two men were sent to replace a reservoir which weighed 256 pounds; b) they were not given a jack or other manual hoisting device; c) the reservoir was under the car; and d) the car was full and, therefore, the boom of the car could not be used to replace the reservoir. This Court charged Burlington with knowledge of the fourth factor because "[t]t is the business of a railroad to know whether

its cars are empty or full." Court's Opinion, p. 6. (emphasis added). However, there is no dispute that the car which Byrd was assigned to repair was not owned by Burlington. (TR. 201). Byrd also admitted this fact in his statement of facts. (Brief of Respondent p. 3.). Therefore, this Court should rehear this case to decide if Burlington's proffered *Oualls* instruction should have been given to the jury in light of the fact that Burlington was not the owner of the car in question and should not have been charged with constructive knowledge of one of the factors which made up the alleged unsafe condition.

WHEREFORE, Defendant/Appellant, Burlington Northern Railroad Company, respectfully requests that this Court rehear and reconsider the opinion herein and reverse the judgment granted herein, and remand this case for a new trial. In the alternative, Defendant/Appellant, Burlington Northern Railroad Company, moves this Court for an order transferring this appeal to the Missouri Supreme Court pursuant to Rule 83.02 on the grounds that this appeal is of general interest and importance and requires a reexamination or interpretation of existing law.

Respectfully submitted,

BRASHER LAW FIRM, L.C.

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was hand-delivered on this 23 day of December, 1996, to:

Joseph L. Bauer, Jr., Esq.
Drew C. Baebler, Esq.
BAUER & BAEBLER
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St. Louis, MO 63102

BY: /s/ Gerard F. Hempstead

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

TO: ATTORNEYS OF RECORD

FROM: DEIRDRE O. SMITH, CLERK

DATE: February 5, 1997

RE: MOTIONS FOR REHEARING AND/OR TRANSFER TO SUPREME COURT DENIED

1. 66320 STATE OF MISSOURI, RESPONDENT
vs. CARTER, CORNELL, .APPELLANT

2. 67432 STATE OF MISSOURI, RESPONDENT
vs. BRAYNON, ANTHONY, APPELLANT

3. 68546 BUDDING, RAYMOND, APPELLANT
vs. GARLAND FLOOR COMPANY, RESPONDENT

4. 69019 STATE OF MISSOURI, RESPONDENT
vs. SUMLING, HENRY L., APPELLANT

5. 69504 OUTCOM, INC., APPELLANT
vs. CITY OF LAKE ST. LOUIS, RESPONDENT

6. 69550 BYRD, KENNETH E., RESPONDENT
vs. BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

7. 69781 STATE OF MISSOURI, RESPONDENT
vs. WHITMORE, THERESA, APPELLANT

8. 69821 TLLISON, THERESA A. & RAYMOND APPELLANT
vs. BOYER, JOHN L. & NANCY F., RESPONDENT

9. 69990 RACHERBAUMER, ;NORMAN H., APPELLANT
vs. RACHERBAUMER, SHARON M., RESPONDENT

10. 69962 BAUTTE, LONNIE & THERESA, RESPONDENT
vs. GENCARE HEALTH SYSTEMS, INC., APPELLANT

11. 69969 CARRAWELL, DARLENE STATE OF MISSOURI, APPELLANT
vs. ISOM, BENJAMIN, RESPONDENT

12. 70077 SMITH, CHARLES, RESPONDENT
vs. CLIMATE ENGINEERING CORPORATION, APPELLANT

13. 70103 ADCOCK, CHARLES A., APPELLANT
vs. NEWTEC, INC., RESPONDENT

14. 70163 CLARK, MALCOM J., APPELLANT
vs. STATE OF MISSOURI, RESPONDENT

15. 70258 KEAVENG, JUSTINE ELIZABETH, APPELLANT
vs. LOHMAN, JANETTE M. DIRECTOR OF REVENUE, RESPONDENT

16. 70304 FISCHER, DONALD J. RESPONDENT
vs. BRANCATO, DONALD H. & DORON ASSOCIATES, APPELLANT

17. 70387 BANK OF WASHINGTON, APPELLANT
vs. KOESTER, JERRY & JIMMY, RESPONDENT

18. 70528 COMBINED COMMUNICATIONS CORPORATION, RESPONDENT
vs. CITY OF BRIDGETON, APPELLANT

19. 70580 SCHAFER, DANNY, RESPONDENT
vs. BI-STATE DEVELOPMENT AGENCY, APPELLANT

20. 70765 MOELLER, ROBERT F., APPELLANT
vs. SOUTHWESTERN BELL TELEPHONE COMPANY, RESPONDENT

RE: MOTIONS FOR REHEARING DENIED

1. 69613 HIATT, DONALD GENE IN THE ESTATE OF, RESPONDENT
vs. *, APPELLANT

IN THE SUPREME COURT
OF THE STATE OF MISSOURI

Circuit Case No. 922009869
Court of Appeals No. 69550
Supreme Court No. _____

Court of Appeals Eastern District

KENNETH E. BYRD,
Plaintiff-Respondent

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant-Appellant.

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion ____ or after opinion ¨x.

The date the record on appeal was filed *February 20, 1996.*

The date the Court of Appeals opinion was filed *December 10 1996.*

The date the motion for rehearing was filed *December 23, 1996.*
and ruled on *February 5, 1997.*

The date the application for transfer was filed
in the Court of Appeals *December 23, 1996.*
and ruled on *February 5 1997.*

List every party involved in the case, indicate the position of the party in the circuit court (e.g., Plaintiff, Defendant, Intervenor) and in the court of appeals (e.g., Appellant or Respondent), and indicate the name and address of the attorney of record for each party. *List first the parties applying for transfer and place a check mark in the space*

following to indicate each party applying for transfer.

Party	Attorney
Burlington Northern x Railroad Company Defendant, Appellant	Gerard F. Hempstead, #20659 211 N. Broadway, Suite 2300 St. Louis, MO 63102
Kenneth E. Byrd Plaintiff-Respondent	Joseph L. Bauer, Jr., Esq. 900 Walnut, Suite 520 St. Louis, MO 63102

Respectfully submitted,

BRASHER LAW FIRM, L.C.

/s/ Gerard F. Hempstead
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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was hand-delivered on this 20 day of February, 1997, to:

Joseph L. Bauer, Jr., Esq.
Drew C. Baebler, Esq.
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900 Walnut, Suite 520
St. Louis, MO 63102

BY: /s/ Gerard F. Hempstead

IN THE SUPREME COURT
OF THE STATE OF MISSOURI

Appeal No. 69550

KENNETH E. BYRD, Plaintiff-Respondent

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,

Defendant-Appellant.

Appeal from the Circuit Court of the City of St. Louis
Hon. Mary K. Hoff
Circuit Case No. 922-09869

CERTIFICATE OF SERVICE

COMES NOW Defendant-Appellant, Burlington Northern Railroad, and hereby certifies that its Application for Transfer to the Supreme Court and Suggestions in Support was mailed this 20 day of February, 1997 via first class U.S. Mail, postage prepaid to: Joseph L. Bauer, Jr., Esq., Drew C. Baebler, Esq., BAUER & BAEBLER, 900 Walnut, Suite 520, St. Louis, MO 63102; and Clerk of the Court, Missouri Court of Appeals, Eastern District, 111 N. 7th Street, St. Louis, MO 63101.

Respectfully submitted,

BRASHER LAW FIRM, L.C.

/s/ Gerard F. Hempstead
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ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT
OF THE STATE OF MISSOURI

Appeal No. 69550

KENNETH E. BYRD
Plaintiff-Respondent

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the Circuit Court of the City of St. Louis
Hon. Mary K. Hoff
Circuit Case No. 922-09869

APPLICATION FOR TRANSFER TO THE SUPREME COURT AND SUGGESTIONS IN SUPPORT

COMES NOW Defendant-Appellant, Burlington Northern Railroad Company ("BN"), pursuant to Rule 83.02, and respectfully requests that this Court accept transfer of this case from the Missouri Court of Appeals, Eastern District. This case should be transferred to the Supreme Court because the court of appeals' decision is in conflict with and contrary to previous decisions of appellate courts of this state, including this Court and because this case presents issues of first impression which are of great importance. This case is an action brought by Plaintiff-Respondent Kenneth Byrd ("Byrd") against BN pursuant to the Federal Employer's Liability Act ("FELA") 45 U.S.C. § 51.

GROUNDS FOR TRANSFER

1. This Court should grant transfer because the court of appeals, upon reviewing and affirming the trial court's refusal to give BN's proffered mitigation of damage instruction, violated this Court's established precedent regarding the giving of a

mitigation of damage instruction and violated this Court's standard of review when it weighed the evidence, discounted BN's evidence which justified submission of the instruction, and concluded as a matter of law that Byrd was justified in not accepting the position offered by BN. The court of appeals' decision is in conflict with this Court's opinion in *Kauzlarich v. Atchison, Topeka, and Santa Fe Railway Co.*, 910 S.W.2d 254, 258 (Mo. banc 1995) which held that when reviewing whether a mitigation instruction should have been given to the jury in a FELA case, "a court must view the evidence in a light most favorable to the submission of that instruction", and with *Hawkes v. Norfolk & Western Railway Co.*, 876 S.W.2d 705, 707 (Mo.App. 1994), and *Edgewater Health Care, Inc. v. Health Systems Management. Inc.*, 752 S.W.2d 860 (Mo.App. 1988) which held that a court must also disregard all evidence that does not support the instruction.

In this case, BN produced evidence that it offered Byrd a position as a clerk with the railroad, that Byrd was qualified for the position, that at the time of the offer Byrd's treating physician had determined that Byrd could work, that Byrd refused to accept the position offered by BN and that Byrd failed to look for other work. The court of appeals discounted BN's evidence because of Byrd's testimony that he was not qualified for the job and that he would lose seniority and benefits if he accepted the job. Under *Kauzlarich*, *Hawkes*, and *Edgewater*, the court of appeals should not have considered Byrd's testimony in determining whether a mitigation instruction should have been given, relied on Byrd's testimony to discount BN's evidence, weighed the evidence, nor concluded, as a matter of law, that Byrd was justified in refusing to accept the job offered by BN. This court should grant transfer to correct this contradiction and conflict between the court of appeals' decision and *Kauzlarich*, *Hawkes*, and *Edgewater*.

2. This Court should also grant transfer because the court of appeals' decision, which affirmed the trial court in giving Byrd's

instruction pertaining to future pecuniary damages and in refusing to give BN's withdrawal instruction regarding those damages, is in conflict with *Anglim v. Missouri Pacific Railroad*, 832 S.W.2d 298, 309 (Mo. 1992), *cert denied, Missouri Pacific Railroad v. Anglim*, 506 U.S. 1041 (1992). *Anglim*, another FELA case, held that "in the absence of any contrary indication" the court could assume that the jury complied with the instruction and determined the present value of future pecuniary losses. *Id.* In this case, there was a contrary indication that the jury could not have determined the present value of Byrd's future pecuniary losses. The voir dire of the jury revealed that no juror knew how to calculate present value, and no evidence was presented at trial regarding the present value of Byrd's future pecuniary losses. However, the trial court and the court of appeals nonetheless assumed that each juror determined the present value of Byrd's future wage loss, despite *Anglim*. This court should grant transfer to correct this contradiction and conflict between the court of appeals' decision and *Anglim*.

3. This Court should also grant transfer because there is another *Anglim* issue presented here which has never been directly addressed by any appellate court in Missouri and the question is of great importance in all FELA cases. The issue is whose burden is it to produce evidence of how to calculate present value when, as Anglim noted, there is a clear indication that no member of the jury knew how to calculate present value? Under the FELA, an award of future pecuniary losses must be reduced to present value. *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485, 491 (1916); *St. Louis Southwestern Railway Co. v. Dickerson*, 470 U. S. 409 (1985). This determination is essentially a factual issue for the jury. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 539 (1983). Under Missouri law, it is the plaintiff's burden to produce some evidence to justify the submission of an instruction. *M.A. I . 3* .01. This Court should grant transfer to determine under *Anglim* whose burden it is to produce evidence of the present value of future pecuniary losses

when there is a clear indication that no one on the jury knows how to calculate present value.

4. This Court should also grant transfer because there is another issue in this case which has never been directly addressed by any appellate court in Missouri, and the issue is of general importance in all civil cases. The issue is whether it is proper to charge a defendant, as a matter of law, with constructive knowledge of an unsafe condition when there is only a fifty-fifty chance that the unsafe condition existed. Under Missouri law, the defendant's knowledge of the alleged unsafe condition is an essential element that must be submitted to the jury if "there [is] an issue of fact as to the defendant's actual or constructive knowledge of the condition." *Oualls v. St. Louis Southwestern Railway Co.*, 799 S.W.2d 84 (Mo.banc 1990), *cert denied, St. Louis Southwestern Railway Co. v. Oualls*, 499 U.S. 961 (1991); *See Also, Riley v. Union Pacific Railroad,* 904 S.W.2d 437 (Mo.App. 1995). In this case, the court of appeals charged BN, as a matter of law, with knowledge of an unsafe condition when the Court itself found that there was only a fifty-fifty chance that the unsafe condition existed. This Court should grant transfer to determine whether it is proper to charge a defendant with knowledge of an unsafe condition when there is no definite evidence that the unsafe condition even existed.

SUGGESTIONS IN SUPPORT

I. THIS COURT SHOULD GRANT TRANSFER BECAUSE THE COURT OF APPEALS' DECISION IS CONTRARY TO AND IN CONFLICT WITH OTHER MISSOURI CASES.

A. THE COURT OF APPEALS DECISION IS IN CONTRARY TO AND IN CONFLICT WITH *KAUZLARICH V. ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO.* 910 S.W.2D 254 (MO. BANC 1995)

As stated in paragraph 1 above, the court of appeals violated this Court's established precedent and the established standard of review when it affirmed the trial court's decision not to give BN's proffered mitigation of damage instruction. This Court recently held in *Kauzlarich v. Atchison Topeka, and Santa Fe Railway Co.*, 910 S.W.2d 254, 258 (Mo. banc 1995) that when reviewing whether an instruction should have been given to the jury, "a court must view the evidence in a light most favorable to the submission of that instruction." Missouri courts have also long held that a court when determining whether to submit an instruction must disregard all evidence that does not support the instruction. *Hawkes v. Norfolk & Western Railway Co.*, 876 S.W.2d 705, 707 (Mo.App. 1994); *Edgewater Health Care, Inc. v. Health Systems Management. Inc.*, 752 S.W.2d 860, 868 (Mo.App. 1988).

In this case, BN produced evidence that it offered Plaintiff Respondent, Kenneth Byrd ("Byrd"), a position as a clerk with the railroad, that Byrd was qualified for the position, that at the time of the offer Byrd's treating physician had determined that Byrd could work, that Byrd refused to accept the position offered by BN and that Byrd failed to look for other work. Byrd offered his own testimony that he did not accept the job offered by BN ,because he felt that he was not qualified for the job and because

he felt he would lose his seniority as a carman and benefits. BN requested that the trial court instruct the jury on mitigation of damages, but the trial court refused to give BN's proffered instruction.

The trial court erred because under Missouri law, an instruction must be given if it is supported by substantial evidence. *Kauzlarich*, 910 S.W.2d at 258. "Substantial evidence is that evidence which, if true, is probative of the issues and from which the jury can reasonably decide the case." *Hawkes*, 876 S.W.2d at 707. BN's evidence, if true, showed that Byrd was offered a position for which he was qualified, that he refused to accept that position and that he failed to look for other work. The trial court should have submitted BN's mitigation instruction to the jury.

The court of appeals affirmed the trial court's decision because "the only employment offered by the railroad was a job for which the plaintiff did not appear to be qualified and which would have cost him his seniority in his carman position and additional benefits." *Byrd v. Burlington Northern Railroad Co.*, No. 69550, slip op. at 4 (Mo.App. 1996). In affirming, the court of appeals failed to follow the correct standard of review. Under *Kauzlarich*, Hawkes, and 0, the court of appeals should have disregarded Byrd's testimony. However, the court not only failed to disregard the evidence, but it actually used Byrd's testimony to discount BN's evidence and conclude, as a matter of law, that Byrd was justified in refusing to accept the job offered by BN. This court should grant transfer because the court of appeals decision is in conflict with the clear authority of this Court and other Missouri appellate courts.

B. HE COURT OF APPEALS' DECISION IS IN CONFLICT WITH *ANGLIM v. MISSOURI RAILROAD*, 832 S.W.2D 298 (MO. 1992)

This Court should also grant transfer because the court of appeals' decision which affirmed the trial court in giving Byrd's

instruction pertaining to future pecuniary damages, and in refusing to give BN's withdrawal instruction regarding those damages is contrary to and in conflict with *Anglim v. Missouri Railroad*, 832 S.W.2d 298, 309 (Mo. 1992), *cert denied, Missouri Pacific Railroad v. Anglim*, 506 U.S. 1041 (1992). In *Angllm*, the Supreme Court held:

> *In the absence of any contrary indication*, [the Court] can assume each juror in his or her respective fashion complied with the instruction, and determined the present value of future wage loss. (emphasis added)

Id. In this case, BN asked the jury panel during voir dire the following question:

> Is there anyone here who knows how to determine how much money would have to be invested today so that Ken Byrd would not lose any net wages for the rest of his working life? Is there anyone who knows how to do so?

(Tr. 89). Only one juror, Ms. Chastain, responded in the affirmative. BN then asked the following question:

> Does anyone other than Ms. Chastain know how to reduce the future pecuniary damage at present value? Does anyone else know how to do this?

(Tr. 113). No juror responded. Ms. Chastain was subsequently struck from the jury panel by Byrd.

There is no dispute that Byrd offered the jury no evidence, either lay or expert, to assist the jury in determining the present value of Byrd's future pecuniary losses. Thus, it was Lmpossible for each juror to determine present value in their own respective fashion because no juror knew how to determine present value. Therefore, under *Anglim*, neither the trial court nor the appellate court could assume that the jury properly reduced the award of future damages to present value. At the very least, this Court

should grant transfer to clarify what constitutes a "contrary indication" under *Anglim* to give guidance to the court and the bar regarding when it is necessary to provide evidence of how to calculate the present value of future pecuniary losses.

II. THIS COURT SHOULD GRANT TRANSFER BECAUSE IT PRESENTS QUESTIONS OF FIRST IMPRESSION WHICH ARE OF GREAT IMPORTANCE AND INTEREST

A. THIS COURT SHOULD GRANT TRANSFER TO ANSWER THE QUESTION OF WHOSE BURDEN IS IT TO PRODUCE EVIDENCE OF THE PRESENT VALUE OF FUTURE PECUNIARY LOSSES WHEN THERE IS A CLEAR INDICATION THAT NO ONE ON THE JURY KNOWS HOW TO CALCULATE PRESENT VALUE AND RESOLVE THE MEANING OF ANGLIM

The above mentioned issue has never been addressed by any Missouri appellate court and is an issue of great importance in FELA cases. Under the FELA, a plaintiff's award of future pecuniary losses must be reduced to present value. *Chesapeake & Ohio* Railway Co. v. Kelly, 241 U.S. 485, 491 (1916); *St. Louis Southwestern Railway Co. v. Dickerson*, 470 U.S. 409 (1985). Under Missouri law, it is the plaintiff's burden to produce evidence to support his instruction. **M.A.I. 3.01.**

Under Federal law there is support that it is the plaintiff's burden to reduce his damages to present value. *DiSabatino v. National Railroad Passenger Corp*, 724 F.2d 394, 396 (3rd Cir. 1984); *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540, 544 (3rd Cir.), *cert denied*, 409 U.S. 879 (1972). There is also contrary federal law. *Duncan v. St. Louis-San Francisco R.R. Co.*, 480 F.2d 79 (8th Cir. 1973), *cert denied*, 414 U.S. 859 (1973). *Duncan*, of course, is a pre-*Dickerson* opinion.

However, in this case, the trial court gave Byrd's instruction regarding future pecuniary damages, when it was clear that the jury did not know how to reduce the award to present value, and plaintiff offered no evidence on this subject. By refusing to give BN's withdrawal instruction, the trial court shifted the burden to produce evidence regarding plaintiff's damage instruction when plaintiff, under both substantive federal and Missouri law, has that burden. *See*, *DiSabatino*, *supra* and **M.A.I. 3.01**. There is no dispute that the court of appeals shifted the burden to BN. The court of appeals held:

> If defendant wishes to influence that determination it is free to present evidence to assist the jury. If it chooses not to, then it leaves that determination to the common knowledge of the jury.

Byrd v. Burlington Northern Railroad Co., No. 69550, slip op. at 4 (Mo.App. 1996).

This shift of the burden is not only contrary to Missouri law, but it is also quite paradoxical because on the mitigation of damage issue, the court of appeals held that BN had to produce evidence to support its instruction, but Byrd did not have to produce evidence to support his instruction relating to future pecuniary losses. The paradox is further enhanced by MAI 2.01 and 3.01 which state that argument is not proof of any issue, and that the jury may only consider the evidence or reasonable inferences derived from the evidence.

B. THIS COURT SHOULD GRANT TRANSFER TO DETERMINE WHETHER IT IS PROPER TO CHARGE A DEFENDANT WITH CONSTRUCTIVE KNOWLEDGE OF AN UNSAFE CONDITION WHEN THERE IS ONLY A FIFTY—FIFTY CHANCE THAT THE UNSAFE CONDITION EXISTED

This question is also a question which has never been addressed under Missouri law and is of great importance in all civil cases. Under Missouri law, the defendant's knowledge of the alleged unsafe condition is an essential element of the plaintiff's case that must be submitted to the jury if "there [is] an issue of fact as to the defendant's actual or constructive knowledge of the condition." *Oualls v. St. Louis Southwestern Railway Co.*, 799 S.W.2d 84, 87 (Mo.banc 1990), *cert denied, St. Louis Southwestern Railway Co. v. Oualls*, 499 U.S. 961 (1991); *See Also, Riley v. Union Pacific Railroad*, 904 S.W.2d 437 (Mo.App. 1995).

In *Oualls*, three factors made up the alleged unsafe condition. The bridge in question had an open deck design, there were no handrails or walkways, and the bridge was slippery because of snow and ice on the bridge. The Court found that there was an issue of whether the defendant had knowledge about the extent of the accumulation of ice and snow and about whether the bridge was slippery. *Oualls*, 799 S.W.2d at 871 The Court held that because there was an factual dispute regarding one of the factors of the alleged unsafe condition, the trial court should have submitted the defendant's knowledge of the unsafe condition to the jury. *Id.*

In this case, as in *Oualls*, there are numerous factors which made up the alleged dangerous condition: a) two men were sent to replace a reservoir which weighed 256 pounds; b) they were not given a jack or other manual hoisting device; c) the reservoir was under the car; and d) the car was full and, therefore, the boom of the car could not be used to replace the reservoir. The court of

appeals held that BN had constructive knowledge of the third factor because BN's supervisor knew that there was a fifty-fifty chance that the reservoir was under the car. This court should grant transfer to determine if BN's knowledge of the alleged unsafe condition should have been submitted to the jury because there was only a fifty-fifty chance that unsafe condition even existed.

WHEREFORE, Defendant/Appellant, Burlington Northern Railroad Company, respectfully requests that this Court grant its Application for Transfer.

Respectfully submitted,

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§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908)[45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or be reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act [45 USCS §§51 et seq.] to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed or shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provision of this Act [45 USCS §§51 et seq.]

to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 55. Contract, rule, regulation, or device exempting from liability; setoff

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act [45 USCS §§ 51 et seq.], shall to that extent void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act [45 USCS §§ 51 et seq.], such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this act [45 USCS §§ 51 et seq.] unless commended within three years from the day the cause of action accrued.

Under this act [45 USCS §§ 51 et seq.] an action may be brought in a circuit [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act [45 USCS §§ 51 et seq.] shall be concurrent with that of the courts of the several States.

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this act [45 USCS §§ 51 et seq.] shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§ 58. Duty or liability of common carriers and rights of employees under other Acts not impaired

Nothing in this act [45 USCS §§ 51 et seq.] shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

§ 59. Survival of right of action of person injured

Any right of action given by this act [45 USCS §§ 51 et seq.] to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

§ 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not

more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this Act [45 USCS §§ 51 et seq.] is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act [45 USCS §§ 51 et seq.] and the applicability of such provision to other persons and circumstances shall not be affected thereby.

Supreme Court, U.S.
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No. 96-2029

In The

Supreme Court of the United States

October Term, 1996

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, formerly known as the BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

KENNETH E. BYRD,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S QUESTION PRESENTED

1. Whether a plaintiff in an action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1996), must produce expert testimony regarding the present value of claimed future economic damages as a condition precedent to recovery?

OBJECTION TO PETITIONER'S QUESTIONS PRESENTED

Petitioner has alleged that the second question presented to the Court is "Whether a plaintiff is entitled to recover claimed future pecuniary damages in an action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1996) . . . when the *voir dire* of the jury reveals that no juror knows how to determine the present value of the plaintiff's future pecuniary damages?" Pursuant to Sup. Ct. R. 15, Respondent objects to Petitioner's second question presented because it assumes that the jury was incapable of returning a verdict for future economic damages at present value and that the jury's verdict is not at present value. This fact-based claim was rejected by the Missouri Court of Appeals and need not be considered by the Court. *See* Sup. Ct. R. 10.

TABLE OF CONTENTS

	Page
Respondent's Question Presented	i
Objection to Petitioner's Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	4
I. Supreme Court Case Law Is Contrary To Petitioner's Position.	4
II. Six Different United States Courts Of Appeal Agree That A Plaintiff In An Action Brought Under The FELA Or Jones Act Does Not Bear The Burden Of Producing Expert Testimony Regarding The Present Value Of Future Economic Damages As A Condition Precedent To Recovery.	5
III. The Reasoning Of The Only Appellate Court In The Nation That Accepts The Petitioner's Position Was Rejected By Subsequent Appellate Courts To Consider This Issue.	6
IV. There Is No Conflict Between The State Supreme Courts That Have Considered This Issue.	8
V. Petitioner's Fact-Based Claim That The *Voir Dire* Established That The Jury Could Not Follow The	

Contents

	Page
Present Value Instruction Was Decided By The State Appellate Court And Should Not Be Reviewed By The Court.	9
Conclusion	12

TABLE OF CITATIONS

Cases Cited:

Aldridge v. Baltimore & Ohio R.R. Co., 789 F.2d 1061 (4th Cir. 1986), *aff'd*, 814 F.2d 157 (4th Cir. 1987) .	7
Alma v. Manufacturers Hanover Trust Co., 684 F.2d 622 (9th Cir. 1982)	5
Anglim v. Missouri Pacific R.R. Co., 832 S.W.2d 298 (Mo. banc 1992), *cert. denied, Missouri Pacific R.R. Co.*, 506 U.S. 1041 (1992)	8
Ballantine v. Central R.R. of New Jersey, 460 F.2d 540 (1972), *cert. denied*, 409 U.S. 879 (1972)	6
Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)	5
Bonura v. Sea Land Service, Inc., 505 F.2d 665 (5th Cir. 1974)	5, 6
Byrd v. Burlington Northern R.R. Co., 939 S.W.2d 416 (Mo. Ct. App. 1996)	10

Contents

	Page
Chesapeake & Ohio Ry. Co. v. Aldridge, 486 U.S. 1049 (1988)	7
Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485 (1916)	6, 7, 10
CSX Transp., Inc. v. Casale, 441 S.E.2d 212 (Va. 1994)	8
Duncan v. St. Louis-San Francisco Ry. Co., 480 F.2d 79 (8th Cir. 1973), *cert. denied, St. Louis-San Francisco Ry. Co.*, 414 U.S. 859 (1973)	5, 7
Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243 (7th Cir. 1974), *cert. denied, Chesapeake & Ohio Ry. Co.*, 419 U.S. 1013 (1974)	5, 6, 7, 10
Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983)	9
Kerman v. American Dredging Co., 355 U.S. 426 (1958)	5
Louisville & Nashville R.R. Co. v. Holloway, 246 U.S. 525 (1918)	4, 9
Miller v. Union Pacific R.R. Co., 900 F.2d 223 (10th Cir. 1990)	5
Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988)	7, 11

Contents

	Page
Pennsylvania R.R. Co. v. McKinley, 288 F.2d 262 (6th Cir. 1961)	4, 5, 6, 10
Reusch v. Seaboard System R.R., 566 So. 2d 489 (Ala. 1990), *cert. denied*, 498 U.S. 1012 (1990)	8, 9
St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985)	7
Statutes Cited:	
45 U.S.C. §§ 51-60	i
46 U.S.C. § 688	5
Rules Cited:	
Sup. Ct. R. 10	i, 10
Sup. Ct. R. 15	i
APPENDIX	
Appendix A — Excerpts of Transcript of Proceedings of the Circuit Court for the City of St. Louis, State of Missouri Dated July 18, 1995 and July 20, 1995	1a
Appendix B — Notice of Withdrawal Filed July 17, 1995	12a

STATEMENT OF THE CASE

Petitioner's Statement of the Case incorrectly notes that "Respondent estimated his earnings from the Railroad would have been Forty Thousand Dollars ($40,000.00) a year at age 49." Petition for Writ of Certiorari at 4. At trial, Respondent introduced evidence of the *net* wages earned by a co-worker, Carlos Hildebrand, who was lower on the seniority roster than Respondent and worked in the same location and craft as Respondent during the years between Respondent's injury and the time of trial. Respondent's Appendix, p. 1a. By virtue of his seniority, Respondent could have worked Hildebrand's job and earned the same amounts as Hildebrand if he had not been injured. Respondent's Appendix, p. 2a. The evidence at the time of trial was that Hildebrand had *net* wages, after state and federal taxes, of $31,057 in 1992; $35,169 in 1993; $40,438 in 1994; and $21,180 for the first six months of 1995. *Id.* at 3a, *et seq.* Thus, Respondent estimated his *net* wage loss at age 49 to be $40,000 per year based upon a comparison to the net earnings of his co-worker, Mr. Hildebrand. Respondent's wages were actually higher than those of Mr. Hildebrand in 1991, the year prior to the accident. Respondent's Appendix, p. 10a.

Petitioner's Statement of the Case also omits other information relevant to the question presented to the Court. Petitioner incorrectly states that Respondent's entire present value calculation was "Forty thousand [dollars] times sixteen years" and that "[o]ther than this comment by counsel, no present value calculation was provided by Respondent." Petition for Writ of Certiorari at 5. However, despite Mr. Hildebrand's average 10.9% annual increase in net wages from 1992 through 1995, Respondent's counsel indicated to the jury to ignore the wage increase when calculating present value. In the portion of the closing argument omitted from Petitioner's Statement of the Case, Respondent's counsel stated that:

> I'm using Carlos Hildebrand's last year working [$49,661] last year he earned as a car man. You can see obviously the wages are going up. Take his net about [$40,438]; round that off to [$40,000] dollars. Ken told you he was gonna work at least until age sixty-five for sixteen years and this is not giving him any raise; this is not taking into account the fact that these wages are going up considerably. And [Hildebrand] this year is ahead of where he was last year. He's headed to make more money this year. I think the present value would be [$640,000]. Forty thousand dollars times sixteen years. That's not even — that's very, very conservative. That's not even giving him a cost of living increase.

Appendix to Petition for Writ, p. 25a.

Petitioner's counsel also spent a significant part of his closing argument explaining to the jury how to calculate present value and informing the jury that any award for future economic damages must be at present value. Counsel for the Petitioner told the jury during closing arguments that "the issue for you to decide is what is the fair and just compensation that Ken Byrd is entitled to receive and have those reduced to present value." Respondent's Appendix, p. 5a. According to Petitioner, the present value calculation is "how much money do I have to put in the bank so that Ken Byrd will receive [$12,694] every year for the next sixteen years; where you at the end of that sixteen years, that bank account is empty. Now how is this going to work?" Respondent's Appendix, p. 8a.

Petitioner's counsel continued with a detailed example of how the present value of $200,000 over 15 years is $150,000:

> [L]et's assume that you can get six per cent return on [$150,000] which means that he will earn [$9,000]. So that at the end of year one you'll have [$159,000] but you'll have to pay out [$12,694]. So you'd end up with less than [$150,000] in year two. If we just ballpark this for math purposes; make it [$13,000] and that will be bringing it down to [$146,000] in year two. You see. Okay. Now I have [$146,000] in the bank. It's going to earn six percent interest and then you multiply that out and come up with [$9,760]. And then you have to pay out twelve thousand dollars off that. So you have another short falling and so on. But that's how you get to present value. And that's — you have to take that all the way through but that is what the Court's instruction is and you are obligated to follow the Court's Instructions because on future pecuniary losses it's got to be reduced to present value so that the time fifteen years is up Ken Byrd is been made whole and all of his wages have basically been paid out of his bank.

Respondent's Appendix, p. 8a, *et seq.*

REASONS FOR DENYING THE WRIT

I.

SUPREME COURT CASE LAW IS CONTRARY TO PETITIONER'S POSITION.

In *Louisville & Nashville R.R. Co. v. Holloway*, 246 U.S. 525 (1918), the Court approved an instruction in an FELA action requiring the jury to award "such an amount in damages as will fairly and reasonably compensate" the plaintiff. *Id.* at 526-27. Justice Brandeis, writing for a unanimous Court, noted that although a more detailed instruction regarding damages would have been proper if requested, the tendered instruction properly informed the jury of the fact that the plaintiff would have access to the money in a lump sum. *Id.* at 528. Thus, the plaintiff, who apparently did not present any expert testimony or other evidence of the present value of her future economic damages, recovered the amount determined by the jury to be the present value of the proven future economic damages. *Holloway* is interpreted as holding that "a jury, unaided by specific testimony as to money values, could themselves, being told that the award should be only money value, properly apply the applicable rule." *Pennsylvania R.R. Co. v. McKinley*, 288 F.2d 262, 265 (6th Cir. 1961). There is no cause for the Court to grant certiorari to review settled law and the Petition should be denied.

II.

SIX DIFFERENT UNITED STATES COURTS OF APPEAL AGREE THAT A PLAINTIFF IN AN ACTION BROUGHT UNDER THE FELA OR JONES ACT DOES NOT BEAR THE BURDEN OF PRODUCING EXPERT TESTIMONY REGARDING THE PRESENT VALUE OF FUTURE ECONOMIC DAMAGES AS A CONDITION PRECEDENT TO RECOVERY.

The United States Courts of Appeal for the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits[1] agree that a plaintiff does not bear the burden of producing expert testimony of the present value of future economic damages as a condition precedent to recovery under the FELA or Jones Act.[2] Contrary to the representation of the Petitioner, these courts do not require plaintiffs to provide expert testimony of present value because

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1. By virtue of the October 1, 1981, split of the Fifth Circuit Court of Appeals, the holding in *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665 (5th Cir. 1974) is also binding in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

2. *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665, 669 (5th Cir. 1974) (action involving an unseaworthiness claim under the general maritime law of the United States and a negligence claim, most likely filed under the Jones Act, 46 U.S.C. § 688, although not specifically stated in the opinion); *Pennsylvania R.R. Co. v. McKinley*, 288 F.2d 262, 265 (6th Cir. 1961); *Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1250 (7th Cir. 1974), *cert. denied, Chesapeake & Ohio Ry. Co.*, 419 U.S. 1013 (1974); *Duncan v. St. Louis-San Francisco Ry. Co.*, 480 F.2d 79, 87 (8th Cir. 1973), *cert. denied, St. Louis-San Francisco Ry. Co.*, 414 U.S. 859 (1973); *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622, 626 (9th Cir. 1982) (action under the Jones Act, 46 U.S.C. § 688, which adopts "the entire judicially developed doctrine of liability" from the FELA. *Kerman v. American Dredging Co.*, 355 U.S. 426, 439 (1958)); *Miller v. Union Pacific R.R. Co.*, 900 F.2d 223, 226 (10th Cir. 1990).

it would be "unfair to force the plaintiff to reduce his damages," but rather because of their belief that juries, if instructed to return verdicts at present value, can properly apply the rule based upon their own experiences with the time value of money and investments. Petition for Writ of Certiorari at 16; *Pennsylvania R.R. Co. v. McKinley*, 288 F.2d 262, 265 (6th Cir. 1961). Similarly, the Court has noted that it is "a matter of common knowledge that . . . the best and safest investments . . . yield only a moderate return" and that "[i]t is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future." *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489-91 (1916).

III.

THE REASONING OF THE ONLY APPELLATE COURT IN THE NATION THAT ACCEPTS THE PETITIONER'S POSITION WAS REJECTED BY SUBSEQUENT APPELLATE COURTS TO CONSIDER THIS ISSUE.

The only appellate court to decide the question presented in the case at bar in favor of Petitioner's position is the Third Circuit Court of Appeals in a line of cases starting with *Ballantine v. Central R.R. of New Jersey*, 460 F.2d 540 (1972), *cert. denied*, 409 U.S. 879 (1972). However, the *Ballantine* court based its opinion not upon an interpretation of any decision of this Court or a review of the legislative history of the FELA, but rather simply upon a belief that American juries are not capable of applying the present value rule without expert testimony. *Id.* at 543-44. The reasoning of the Third Circuit has been rejected by subsequent appellate courts to consider the issue. *E.g., Bonura v. Sea Land Service, Inc.*, 505 F.2d 665, 669 (5th Cir. 1974); *Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1249-50 (7th Cir. 1974), *cert. denied, Chesapeake & Ohio Ry. Co.*, 419

U.S. 1013 (1974); *Duncan v. St. Louis-San Francisco Ry. Co.*, 480 F.2d 79, 87 (8th Cir. 1973), *cert. denied*, *St. Louis-San Francisco Ry. Co.*, 414 U.S. 859 (1973).

Petitioner attempts to support its position with the Court's reversal of a Fourth Circuit opinion in *Chesapeake & Ohio Ry. Co. v. Aldridge*, 486 U.S. 1049 (1988) (mem.). However, the Court's memorandum reversal in *Aldridge* simply reaffirmed the long line of cases holding that the failure to instruct on present value in an FELA action is error. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 340-41 (1988); *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 412 (1985) (*per curiam*); *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489 (1916). The jury in the present case was properly instructed to return any award for future economic damages at present value.

Further, the plaintiff in *Aldridge* did not produce expert testimony of the present value of his future economic damages. *Aldridge v. Baltimore & Ohio R.R. Co.*, 789 F.2d 1061, 1066 (4th Cir. 1986), *aff'd*, 814 F.2d 157 (4th Cir. 1987) (en banc). If the law actually was as advocated by Petitioner, the Court would not have vacated the Fourth Circuit's opinion, but rather would have directed a verdict in favor of the defendant railroad for plaintiff's failure to establish an element of his *prima facie* case or remanded with instructions to allow plaintiff the opportunity to introduce the necessary expert testimony of present value. Therefore, *Aldridge* supports the rationale underlying the clear majority position that a properly instructed jury is capable of returning a verdict for future economic damages at present value without expert testimony based upon the jurors' everyday experiences with the time value of money and investments.

IV.

THERE IS NO CONFLICT BETWEEN THE STATE SUPREME COURTS THAT HAVE CONSIDERED THIS ISSUE.

Respondent's research has discovered only two state supreme court cases that have decided the issue of whether the plaintiff in an FELA action bears the burden of producing expert testimony of present value: *CSX Transp., Inc. v. Casale*, 441 S.E.2d 212 (Va. 1994) and *Anglim v. Missouri Pacific R.R. Co.*, 832 S.W.2d 298 (Mo. banc 1992), *cert. denied*, *Missouri Pacific R.R. Co.*, 506 U.S. 1041 (1992). Both courts have held that the plaintiff does not bear the burden of producing expert testimony of the present value of future economic damages as a condition precedent to recovery. *Casale*, 441 S.E. 2d at 216; *Anglim*, 832 S.W.2d at 308-09.

Contrary to the representation of the Petitioner, there is no split of authority in the state supreme courts, nor are the state supreme courts "making up their own rules" with regard to the present value issue. Petition for Writ of Certiorari at 13. The fact that only two state supreme courts have even reached this issue is indicative that the law in this area is well-settled. Petitioner erroneously contends that in *Reusch v. Seaboard System R.R.*, 566 So. 2d 489 (Ala. 1990), *cert. denied*, 498 U.S. 1012 (1990), the Supreme Court of Alabama "held that the plaintiff in a FELA action has the burden to produce evidence relating to the present value of future pecuniary damages." Petition for Writ of Certiorari at 12. However, the Supreme Court of Alabama clearly never reached the issue.

In support of his claim of future economic losses, Reusch testified only to his earnings for the five years prior to his accident and in the year of the accident. *Reusch*, 566 So. 2d at

492. The *Reusch* court held that, at most, the plaintiff "produced only a portion of the evidence necessary to ascertain his stream of earnings." *Id.* This Court has noted that an award of a lump sum for future economic damages involves two steps, the first of which is computation of the lost stream of earnings. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 536 (1983). Reusch failed to produce enough evidence to calculate the lost stream of future earnings, the *first* step in awarding a present lump sum for future economic damages. *Reusch*, 566 So. 2d at 492. Accordingly, by definition, the *Reusch* court did not even reach the question presented of whether the plaintiff must produce expert testimony of the present value of future economic damages, the *second* step in the calculation. The state supreme courts that have reached and considered the question in the case at bar are in agreement that an FELA plaintiff does not bear the burden of producing expert testimony of the present value of future economic damages as a condition precedent to recovery.

V.

PETITIONER'S FACT-BASED CLAIM THAT THE *VOIR DIRE* ESTABLISHED THAT THE JURY COULD NOT FOLLOW THE PRESENT VALUE INSTRUCTION WAS DECIDED BY THE STATE APPELLATE COURT AND SHOULD NOT BE REVIEWED BY THE COURT.

Petitioner opines that the *voir dire* examination sufficiently distinguishes the case at bar from the numerous appellate decisions, *supra*, which base their holdings on the Court's decision in *Louisville & Nashville R.R. Co. v. Holloway*, 246 U.S. 525 (1918) and the belief that average jurors can apply the present value rule as a result of their everyday experiences with investments and the earning power of money. Petitioner's fact-based claim — that the *voir dire* established that the jury could not and did not return a verdict at present value — was rejected

by the Missouri Court of Appeals. *Byrd v. Burlington Northern R.R. Co.*, 939 S.W.2d 416, 417-18 (Mo. Ct. App. 1996). As such, the Court need not address Petitioner's second question presented because the asserted error is an "erroneous factual finding or misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Furthermore, on the merits, the trial court below properly instructed the jury to return any award for future pecuniary damages at present value. The *voir dire* responses fail to establish that the potential jury members were not aware that a dollar today was worth more than a dollar payable in the future. *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 489 (1916). Nor did the *voir dire* questioning touch upon the juror's everyday experiences regarding today's economy and the earning value of money. *Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1250 (7th Cir. 1974), *cert. denied*, *Chesapeake & Ohio Ry. Co.*, 419 U.S. 1013 (1974). Rather, the *voir dire* panel members were asked, before hearing any evidence of lost earnings or arguments of counsel, whether they knew how to "reduce a future pecuniary damage at present value."[3] The basis of the Sixth Circuit's *McKinley* opinion, and the Fifth, Seventh and Eighth Circuits that cite *McKinley* with approval, is that jurors are "generally aware, from today's economy and their own experience with it, of the earning value of money when placed in safe investments." *Pennsylvania R.R. Co. v. McKinley*, 288 F.2d 262, 265 (6th Cir. 1961). The fact that no members of the jury knew how to "reduce a future pecuniary damage at present value" *before* trial does

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3. Petitioner's counsel spent almost his entire closing argument explaining to the jury his method of returning future damages at present value. Respondent's Appendix, p. 5a, *et seq*. Petitioner had designated an expert economist, Dr. Walter Johnson, to testify regarding the present value of Plaintiff's future economic damages, but elected not to call him during the trial of this matter. Respondent's Appendix, p. 12a. Respondent's counsel also gave the jury his present value calculation. Appendix to Petition for Writ, p. 25a, *et seq*.

not establish that the jury failed to follow the trial court's present value instruction and listen to the arguments of counsel nor that "Respondent was allowed to recover his future pecuniary damages . . . without a reduction to present value. . . ." Petition for Writ of Certiorari at 20.

Finally, even if it is assumed *arguendo* that the Third Circuit is correct and that juries are incapable of returning verdicts at present value without expert testimony and are apt to simply total and award the arithmetic sum of the future economic damages, the present jury actually applied the "total offset" method because Respondent's counsel indicated to the jury to use $40,000 as a static net wage loss and not to consider the fact that Plaintiff's wages would continue to go up, as evidenced by Mr. Hildebrand's 10.9% average annual net wage increase. Appendix to Petition for Writ, p. 25a; Respondent's Appendix, pp. 2a; 10a. The "total offset" method has been noted to be "not arbitrary and would not constitute reversible error if employed by a judge in a bench trial, even if the parties had not introduced evidence to support it." *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 354 (1988) (O'Connor, J., dissenting in part). Thus, even assuming *arguendo* that the jury totalled the arithmetic sum of the future economic damages, the verdict returned was at present value by the "total offset" method and Petitioner sustained no prejudice. A holding by the Court that FELA plaintiffs must introduce expert testimony of the present value of future economic damages as an element of their *prima facie* case would not change the outcome of the case at bar in a new trial on the issue of damages because the "total offset" method would place the present value of Respondent's future net wage loss at $640,000 ($40,000 x 16 years) by credibly assuming the 10.9% average annual net wage increase would, at a minimum, offset any reasonable investment opportunities available to the Respondent.

CONCLUSION

It is well-settled law throughout the Nation, except in the Third Circuit, that a plaintiff in an FELA action does not bear the burden of producing expert testimony of the present value of future economic losses as a condition precedent to recovery. A holding to the contrary would require all FELA plaintiffs to hire an expert economist to testify at trial in every case involving claims of future lost wages or future medical expenses, no matter the amount at issue or when the future losses would be incurred. Accordingly, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS, STATE OF MISSOURI DATED JULY 18, 1995 AND JULY 20, 1995

* * *

[259] Northern employee?

A: Yes.

Q: And what is your craft that you work for the Burlington Northern?

A: I'm a car man.

Q: And how long have you been a car man?

A: Twenty-eight years.

Q: And let me ask you this, are you familiar with the various jobs that are available for a car men to do in the Springfield area?

A: Yes, I am.

Q: And are those jobs bid out and available based upon seniority?

A: Yes, they are.

Q: And can you tell the jury what you mean by availability based on seniority of a job?

A: Well, they — oldest man in seniority deal has his choice of jobs.

Q: All right. And do you know Ken Byrd?

A: Yes, I do.

Q: Have you worked with Ken Byrd as a car man for the Burlington Northern Railroad?

A: Yes, I have.

Q: And are you aware that he has not been working since I think April of 1992?

[260] A: Yes.

Q: Were you present when he was injured?

A: No.

Q: Let me ask you this. Where on the seniority roster are you in relation to Ken, more seniority or less seniority?

A: Less.

Q: So does that mean that whatever job you have or you hold if Ken were able to work he could hold that with his seniority?

A: Yes.

Q: And then he would be able to earn basically the same wages that you have earned?

A: Yes.

* * *

Appendix A

[266] Q: And the net?

A: Twenty-nine, zero, six, seven, 0, sixty-two.

Q: 0 — seven, 0, sixty-two?

A: Yes, zero, six, two.

Q: Then Mr. Hildebrand in 1992, what was your gross income?

A: Thirty-six thousand, seven hundred and thirty-nine.

Q: And the taxes withheld?

A: Five thousand, six.

Q: Five thousand, six hundred and eighty-one?

A: Yes. And ninety-four cent.

Q: And the net then?

A: Thirty-one, zero, five, seven and — and six cent.

Q: 0, six?

A: 0, six.

Q: And then in 1993?

A: Forty-one, eight hundred and forty-six?

Appendix A

Q: All right, forty-one thousand, eight hundred, thirty?

A: Forty-six.

Q: Forty-six. And the taxes there withheld?

A: Six thousand, six hundred and six — seven

[267] Q: — seven, twenty-four.

A: Six thousand, six hundred and seven — seven dollars and twenty-four cent?

Q: Yes.

A: And the net?

Q: Thirty-five, one sixty-eight and seventy-six cent.

A: And then what about 1994?

Q: Forty-nine, six hundred and sixty-one.

A: Forty nine thousand?

Q: Yes.

A: Six, sixty-one?

Q: Yes.

A: And the taxes?

Q: Nine thousand, two hundred and twenty-two and ninety-three cent.

A: And the net then for 1994?

Q: Four, 0, four, three, eight, four, 0, seven.

A: Seven?

Q: 0, seven.

A: And are those the wages that you have earned working as a car man in the Springfield area?

A: Yes.

Q: For the Burlington Northern Railroad?

* * *

[Commencing July 20, 1995]

[635] fact that Ken Byrd was hurt than any of us do. But the issue for you to decide is what is the fair and just compensation that Ken Byrd is entitled to receive and have those reduced to present value. It's fair and just compensation and those are the things that you have to think about when you go to your jury room to deliberate on this issue. I understand that this is a tough decision and you probably never thought when you came in here on Monday that you were going to be asked to actually evaluate a particular situation. Most of these cases end up being resolved without having to go to the jury. But now the decision is yours and I know that you've listened to the evidence and I know that

you've — you know, were very a tentative but now the arguments are being made by the attorneys and these require the same amount of attention that the testimony that you heard. What we're talking about here, is Ken Byrd fair and just compensation. And how do we arrive at that? We don't look at somebody else's wages, we look at Ken Byrd's wages. We don't look at somebody whose fifteen or twenty people down on the seniority list and say we finally found somebody whose making more money than Ken Byrd so we'll use him as the standard for deciding how much [636] Ken Byrd would make. We think we should look at what Ken Byrd was making. And seniority is a choice, it's not about money. So I think that — let's look at what Ken Byrd was making before he was injured and then decide what fairly and justly compensates Ken Byrd for that, taking into consideration that he has received disability benefits since 1992 and that no matter what you award Ken Byrd he will continue to receive those disability benefits until he reaches age sixty-five at which time he is eligible for his regular retirement. So that is an important thing for you to keep in mind. He's always going to receive that money every year, tax free.

Let's talk about Ken Byrd. The evidence shows that Ken Byrd made thirty-six thousand dollars in 1991. That's the last twelve months he worked and that's the fair starting point for Ken Byrd. However, he had taken out of his paycheck, ten thousand dollars; it's all in evidence, R.R.B. tax, Federal tax, State tax; the Medicare tax. Ten thousand dollars was taken out of his salary on a regular basis which left him with approximately twenty-five thousand, eight hundred dollars at the end of 1991. So that's Ken Byrd's salary through — during the last year that he worked. That's also [637] what he took home, what he actually had available to spend in pocket. Now you remember that Mr. Bauer went through great length and said now what else is there?

What else is there? Well, the main thing, the biggest thing was the cost of health insurance which we can all agree is a high cost. We put it in at six, that's six thousand dollars, that is the health insurance he has to pay. So the total is thirty-one thousand, eight hundred and ninety-four dollars. Now what is Ken Byrd actually losing? Well, there's testimony that he receives nineteen thousand, two hundred dollars every year. And the testimony is that just like his wages would go up so also does that disability benefit go up. You remember that Ken said that in 1994 he was making fifteen hundred and seventy-five dollars a month and now he's up to sixteen, 0, five a month. So it's went up approximately thirty, thirty-five dollars every month. And there will be another cost of living adjusting in 1996 and 1997 and every year for the next fifteen years. So just like his salary would go up, so also would the cost of living adjustment and the disability benefits and therefore the salary increase and the cost of living benefits offset each other. This leaves you with a difference [638] of twelve thousand, six hundred and eighty-four dollars. And that is the difference every year for the next fifteen years that Ken Byrd is going to lose. Now you say well, is that fair and reasonable? We're talking right now about money damages. Money damages; loss earnings, that's what were talking about at this point and time. And this is the calculation, not based on Mr. Hildebrand, not based on somebody making less, not based on somebody making more but solely based on what Ken Byrd was making and that is the standard to compensate Ken Byrd. So we take the twelve thousand dollars and we multiply it by sixteen years because that truly is the amount of time he's going to have until he reaches the age of sixty-five. It's two hundred and three thousand dollars. Now, that is effectively the short fall as to what Ken Byrd would need to make him whole had he worked every one of those fifteen years. He's going to be two hundred and three thousand, one hundred and four dollars short.

Appendix A

Now let's look at the Instruction. This is a very important Instruction; it's Instruction Number Eight. So when you get to the jury room look for Instruction Number Eight. It says, "You must award the Plaintiff such sum as will fairly and justly [639] compensate the Plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a result of the occurrence. Any award of — of future pecuniary damages, 'which is what we're talking about here,' must be included at present value. Any award you make is not subject to income tax." So if you returned a verdict for two hundred thousand dollars for Ken Byrd he would not pay one dime of tax on that. He wouldn't pay any Federal tax, he wouldn't pay and State tax, he wouldn't pay any R.R.B. tax, nothing. But the key word here is any award of future pecuniary damages must be included at present value. Now you were all asked a question at the beginning as to whether you could calculate present value pecuniary damages. And unfortunately no one was able to do that and that's because it's a rather complicated thing to do. But that's what the Court's Instruction suggest that you do and actually mandates that you do, is to reduce it to present value. So how do you do this? What is present value? The one question would be how much money do I have to put in the bank so that Ken Byrd will receive twelve thousand, six hundred and ninety-four dollars every year for the next sixteen years; were you at the end of that sixteen years, [640] that bank account is empty. Now how is this going to work? We've already factored in the fact that he's going to get a raise every years and he's going to get a raise in the retirement benefits, so the raises are going to be parallel so we don't have to worry about that. But let's assume that the present value is a hundred and fifty thousand dollars on two hundred thousand dollars over fifteen years. And let's assume that you can get six per cent return on a hundred and fifty thousand dollars which means that he will earn nine

thousand dollars. So that at the end of year one, you'll have a hundred and fifty-nine thousand dollars but you'll have to pay out twelve thousand, six hundred and ninety-four dollars. So you'd end up with less than a hundred and fifty thousand dollars in year two. If we just ballpark this for math purposes; make it thirteen thousand dollars and that will be bringing it down to one, forty-six in year two. You see. Okay. Now I have a hundred and forty-six thousand dollars in the bank. It's going to earn six percent interest and then you multiply that out and come up with nine thousand, seven hundred and sixty dollars. And then you have to pay out twelve thousand dollars off that. So you have another short falling and so on. But [641] that's how you get to present value. And that's — you have to take that all the way through but that is what the Court's instruction is and you are obligated to follow the Court's Instructions because on future pecuniary losses it's got to be reduced to present value so that the time fifteen years is up Ken Byrd is been made whole and all of his wages have basically been paid out of his bank. In addition, you can award him for the pain and suffering that he's experienced over the last several years and what you think he will recover or should be awarded in the future. But I wanted to get it straight in your own mind as to what this Court has instructed you to do; not just put up a bunch of numbers and not just say well, he should earn this, he should earn this and he should earn this and that's what it is folks. That's the gross number because that's the number that Mr. Bauer is putting up. That's not the instruction of the Court. Any award of future pecuniary damages must be included at present value. Now you all agreed to follow the Instructions. You all agreed that whether you liked the Instructions or didn't like the Instructions that you would follow them. And that's why — what I'm asking you to do. I know that it's a difficult decision that you're going to . . .

* * *

[645] regardless of what you verdict is because you are what makes the system work. Thank you very much.

THE COURT: Thank you, Mr. Hempstead.

RESPONDENT'S COUNSEL: This is pretty interesting. Ken Byrd for twenty-seven years worked for this Railroad. Ken Byrd for twenty-seven years did his best to be one of Bo Armstrong's best men. Ken Byrd gave his back to the Railroad because of the way they treated him when he was working there. They treated him negligently then and they're trying to make you treat him just as bad now. Let me ask you a question. Does it cost you the same amount of money as it did five years ago to buy groceries? No. Are we taking into account that people's income goes up? Do they want to do that? No. Now I presented Carlos Hildebrand's earnings to you because I think that is fair. Exhibits Forty — Forty and Thirty-three show that Ken Byrd made more money when he was able to work than Carlos Hildebrand. Read them, take a look at them. In 1991, Carlos made thirty-four thousand, three hundred and eight-six dollars. In 1991, Ken Byrd made thirty-six thousand, five hundred [646] and eighty-one dollars.

* * *

[647] years or less. Just treat him like some piece of meat, have you look at him and you're being told well, this is real nice. We got a guy that can — can't walk now without a cane, who can't sleep more than an hour or two at a time, who's irritable, who can't play with his grand kids, who can't do anything as he did before and we're not going to give you any compensation for

that. The other thing I wanted to point out to you; you got the Instructions. The Court doesn't say any award of future pecuniary damages must be reduced to present value, it said, "it must be included at present value," which is why I asked you, do you pay the same now for groceries that you did five years ago. Heavens, no. Inflation raises the price of everything. People's wages go up, inflation goes up; that pretty well cancels out. So what does that leave you with? You look at the earnings of what a car man, a hard working car man like Ken Byrd could earn, that's about forty thousand dollars a year in my calculations for the damages in this case. And I want to tell you it is a lot of money and it's not easy being a juror and awarding a full fair; just verdict. I now that's not easy but that's your duty. That's your job and when you leave this. . . .

APPENDIX B — NOTICE OF WITHDRAWAL FILED JULY 17, 1995

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No.: 922-9869

Division No.: 3

KENNETH E. BYRD,

Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant.

Notice of Withdrawal Of Experts

COMES NOW Defendant, Burlington Northern Railroad Company and withdraws Dr. Walter Johnson, Mr. James England, and Dr. Glen Johnson as experts in this cause of action.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 96-2029

In The

Supreme Court of the United States

October Term, 1996

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, formerly known as BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

KENNETH E. BYRD,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Missouri

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

CASES:

Alma v. Manufacturers Hanover Trust, 684 F.2d 622 (9th Cir. 1982) 4

Anglim v. Missouri Pacific Railroad Co., 832 S.W.2d 298 (Mo.banc 1992), *cert. denied, Missouri Pacific Railroad Co. v. Anglim*, 506 U.S. 1041 (1992) 5

Ballentine v. Central R.R. of New Jersey, 460 F.2d 540 (3rd Cir. 1972), *cert. denied*, 409 U.S. 879 (1972) 3

Bonura v. Sea Land Service, Inc., 505 F.2d 665 (5th Cir. 1974) 3

Chesapeake & Ohio R.R. Co. v. Kelly, 241 U.S. 485 (1916) 2, 6, 7

CSX Transportation, Inc. v. Casale, 441 S.E.2d 212 (Va. 1994) 5

DiSabatino v. National R.R. Passenger Corp., 724 F.2d 394 (3rd Cir. 1984) 3

Duncan v. St. Louis-San Francisco Ry. Co., 480 F.2d 79 (8th Cir. 1973), *cert. denied, St. Louis-San Francisco Ry. Co.*, 414 U.S. 859 (1973) 3

Gorniak v. National R.R. Passenger Corp., 389 F.2d 481 (3rd Cir. 1989) 3

Heater v. C&O Ry. Co., 497 F.2d 1243 (7th Cir. 1973), *cert. denied, C&O Ry. Co.*, 419 U.S. 1013 (1974) 3

Louisville & Nashville R.R. Co. v. Holloway, 246 U.S. 525 (1918) 2

Miller v. Union Pacific R.R. Co., 900 F.2d 223 (10th Cir. 1990) 4

TABLE OF AUTHORITIES – Continued

Page(s)

Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988) 2, 6

Pennsylvania R.R. Co. v. McKinley, 288 F.2d 262 (6th Cir. 1961) 3

Reusch v. Seaboard System R.R., 566 So.2d 489 (Ala. 1990), *cert. denied*, 498 U.S. 1012 (1990) 4, 5

St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985) 2, 6

Vanskike v. ACF Industries, 665 F.2d 188 (8th Cir. 1981) 1

Wilson v. Consolidated Rail Corp., 875 S.W.2d 178 (Mo.App. 1994) 3

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent admits in his Brief In Opposition that there is a conflict between the federal circuit courts on the issue of whether the plaintiff has the burden to produce evidence of the present value of his claimed future pecuniary damages in an action under the Federal Employers' Liability Act 45 U.S.C. §§ 51-60. The fact that there is a clear split in the federal circuits on the exact which Petitioner is requesting this Court to grant certiorari, supports Petitioner's argument that this Court needs to address the issue.

Furthermore, this case presents the burden of proof issue in a straight forward manner which highlights the importance and substantive impact the issue. The voir dire of the jury revealed that no juror knew how to calculate the present value of future pecuniary damages. It was clear that without the assistance of some evidence relating to the present value of Respondent's future pecuniary damages, the jury would be unable to calculate the present value of Respondent's future pecuniary damages. However, the trial court allowed Respondent to submit his claim for future pecuniary damages to the jury when the Respondent offered absolutely no evidence whatsoever on this issue. Respondent argues in his Brief in Opposition that he offered "evidence" in his closing argument however, the law is clear that neither opening or closing argument is evidence. *Vanskike v. ACF Industries*, 665 F.2d 188, 210-211 (8th Cir. 1981).

The Missouri Court of Appeals' decision in this case circumvents the present value rule as articulated by this

Court because the practical reality of the Missouri Court of Appeals' decision is that Respondent was allowed to recover his future pecuniary damages in a FELA action without a reduction to present value which is clearly in violation of this Court's established precedent for over eighty years. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988); *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985); *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485, 491 (1916).

I. THE SUPREME COURT CASE CITED BY RESPONDENT IS NOT CONTRARY TO PETITIONER'S POSITION.

Respondent, Kenneth E. Byrd's ("Respondent") use of *Louisville & Nashville R.R. Co. v. Holloway*, 246 U.S. 525 (1918), is seriously misleading. The Court in *Holloway* held that a Defendant railroad may not complain about a general instruction on damages if the Defendant railroad did not specifically request a specific instruction that the plaintiff's damages must be reduced to present value. The *Holloway* Court never discussed what evidence was admitted at trial to support the instruction and the Court most certainly never held or even implied that a jury could properly reduce to present value without the assistance of evidence. In fact, Respondent did not cite *Holloway* to support his argument, instead, Respondent stated "*Holloway*" is interpreted as holding".

Additionally, under existing Missouri law, MAI 8.02, which instructs the jury that "any award of future pecuniary damages must be included at present value," is the exclusive means of instructing the jury regarding present

value and no futher instruction setting forth how present value is to be calculated is permitted. *Wilson v. Consolidated Rail Corp.*, 875 S.W.2d 178, 183 (Mo.App. 1994). Therefore, Petitioner was foreclosed from requesting any additional instruction regarding present value. *Id.* Furthermore, it is not the Petitioner's burden to present evidence of or instruct the jury on the present value of the Respondent's future pecuniary damages.

II. RESPONDENT ADMITS IN HIS BRIEF IN OPPOSITION THAT THERE IS A CLEAR SPLIT IN THE FEDERAL CIRCUITS ON THE ISSUE RAISED IN THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Respondent's argument in Sections II and III of his Brief in Opposition clearly shows that there is a split in the federal circuits on the exact issue which Petitioner wants this Court to grant certiorari. The Third Circuit has consistently held that a plaintiff has the burden to produce evidence of the present value of his claimed future pecuniary damages. *Ballentine v. Central R.R. of New Jersey*, 460 F.2d 540 (3rd Cir. 1972), *cert. denied*, 409 U.S. 879 (1972); *DiSabatino v. National R.R. Passenger Corp.*, 724 F.2d 394 (3rd Cir. 1984); *Gorniak v. National R.R. Passenger Corp.*, 389 F.2d 481 (3rd Cir. 1989). The Fifth, Sixth, Seventh, and Eighth Circuits have held that the defendant has the burden to produce evidence relating to the present value of future pecuniary damages. *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665 (5th Cir. 1974); *Pennsylvania R.R. Co. v. McKinley*, 288 F.2d 262 (6th Cir. 1961); *Heater v. C&O Ry. Co.*, 497 F.2d 1243 (7th Cir. 1973), *cert. denied, C&O Ry. Co.*, 419 U.S. 1013 (1974); *Duncan v. St. Louis-San Francisco*

Ry. Co., 480 F.2d 79 (8th Cir. 1973), *cert. denied, St. Louis-San Francisco Ry. Co.*, 414 U.S. 859 (1973). The fact that there is a clear split in the federal circuits on the exact issue which Petitioner is requesting this Court to grant certiorari, supports Petitioner's argument that this Court needs to address the issue.

Contrary to Respondent's representations, the Ninth and Tenth Circuits have not held that a FELA plaintiff does not bear the burden of producing evidence of the present value of his future pecuniary damages. The Ninth Circuit has split the burden of proof and held that the plaintiff has the burden to produce evidence about the need to adjust a lump sum award for inflation, and the defendant has the burden to produce evidence about the need to discount a lump sum award because of the effect of interest rates. *Alma v. Manufacturers Hanover Trust*, 684 F.2d 622 (9th Cir. 1982). Furthermore, the Tenth Circuit in *Miller v. Union Pacific R.R. Co.*, 900 F.2d, 223, 226 (10th Cir. 1990) never addressed the issue and does not support either party's argument.

III. THERE IS A SPLIT IN THE STATE COURTS ON THE ISSUE RAISED IN PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Respondent's argument that there is no split in the state courts on the issue raised in Petitioner's Petition For Writ of Certiorari is without merit. The Supreme Court of Alabama in *Reusch v. Seaboard System R.R.*, 566 So.2d 489 (Ala. 1990), *cert. denied*, 498 U.S. 1012 (1990), held:

> Under the applicable federal decisions, we must conclude that [plaintiff] did not produce the

> evidence necessary to sustain his claim for loss of future earning. The trial court did not err by instructing the jury that it could not award Reusch damages for future earnings and loss of earning capacity.

Upon review of the evidence, the Supreme Court of Alabama stated that:

> Reusch did not offer evidence of the interest rate on the best and safest investment as well as an application of a discount rate to his alleged stream of earnings. Finally, Reusch offered no evidence of the effect of inflation on any stream of earnings he may have had.

In stark contrast to the *Reusch* decision, the Virginia Supreme Court has placed the burden to produce evidence relating to the present value of a FELA plaintiff's future pecuniary damages on the defendant. *CSX Transportation, Inc. v. Casale*, 441 S.E.2d 212, 216 (Va. 1994). The Missouri Supreme Court has held that neither party needs to produce any evidence because "[i]n the absence of any contrary indication, we can assume each juror in his or her respective fashion complied with the instruction and determined the present value of future wage loss." *Anglim v. Missouri Pacific Railroad Co.*, 832 S.W.2d 298, 309 (Mo.banc 1992), *cert. denied, Missouri Pacific Railroad Co. v. Anglim*, 506 U.S. 1041 (1992).

Furthermore, it is true that the state supreme courts are seeking guidance from this Court on the issue raised in Petitioner's Petition for Writ of Certiorari. In *CSX Transportation, Inc. v. Casale*, 441 S.E.2d 212, 215 (Va. 1994) the court noted:

> To date, the Supreme Court has not decided the issue, and the federal circuit courts are in conflict on the question. . . . Therefore, without the availability of a controlling and explicit federal ruling, we must establish the rule to be applied in state courts in Virginia.

IV. THERE IS NO FACTUAL DISPUTE TO BE RESOLVED BY THIS COURT

There is no factual dispute that the jury in this case revealed in voir dire that they did not know how to calculate the present value of future pecuniary damages. Neither the trial court nor the Missouri Court of Appeals disputed this fact.

Under these undisputed facts, the Missouri Court of Appeals' decision in this case circumvents the present value rule because Respondent was allowed to recover his future pecuniary damages without a reduction to present value which is clearly in violation of this Court's established precedent for over eighty years. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988); *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985); *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485, 491 (1916). The voir dire of the jury revealed that no juror knew how to calculate the present value of future wage loss. The Respondent struck the only juror which was capable of making a present value calculation. The Respondent then offered no evidence whatsoever relating to the present value of his future pecuniary damages. It was impossible for this jury to calculate the present value of Respondent's future pecuniary damages. However, the Missouri Court of Appeals still affirmed the trial court's decision to allow Respondent to recover his future pecuniary damages. The Missouri Court of Appeals left the present

value calculation to the jury which had no knowledge how to calculate present value, and then assumed that the jury would determine the present value of Respondent's future pecuniary damages. This decision drastically undermines the present value instruction and essentially makes it meaningless.

CONCLUSION

This case gives the Court the perfect vehicle to address an issue which has caused a conflict between the federal circuit courts and a conflict between the state courts. The issues raised in this Petition for a Writ of Certiorari were properly preserved, and are substantive issues which need a decisive answer from this court. Furthermore, this case highlights the need for an answer from this court because the jurors in this case were instructed to follow the law, but it was impossible for the jurors to follow the law as articulated by this court in *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485, 491 (1916). Wherefore, Petitioner respectfully requests that this Court issue a Writ of Certiorari.

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